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JOINT APPENDIX TO BRIEFS

IN THE
Supreme Court of the United States

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

PETITION FOR CERTIORARI FILED JUNE 12, 1967
CERTIORARI GRANTED DECEMBER 18, 1967

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PETITIONERS' DESIGNATION OF EVIDENCE

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EXPLANATION OF RECORD

Arrangements were made through stipulation of the parties and the cooperation of the Clerk of Washington State Supreme Court and by order of the Washington State Supreme Court to forward the entire original record to the United States Supreme Court.

The record from the Washington Superior Court to the Washington State Supreme Court was three designations. First, a verbatim statement of the entire proceedings in the trial court was prepared and this was referred to as 'Statement' and in this Appendix will be referred to as R. St. (Record Statement). Secondly, the Clerk in the trial court prepared and certified for the Washington State Supreme Court relevant pleadings by the parties, orders, judgment, and findings of the trial court. These certified documents were forwarded to the Washington State Supreme Court and entitled 'Transcript'. For purposes of this Appendix, reference to this Transcript will be abbreviated R.T. (Record Transcript). Thirdly, the exhibits at trial court were designated as P. Ex. being the abbreviation for the plaintiffs' exhibit who are the respondent in this proceeding and D. Ex. which is the abbreviation for defendants' exhibits who are the petitioners in this proceeding. For purposes of this Appendix, the abbreviations will be R.P. Ex. (Record exhibit by plaintiff) and R.D. Ex. (Record exhibit by defendant).

RELEVANT DOCKET ENTRIES

CIVIL DOCKET

Pierce County Superior Court (trial court)

Title of Case:

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Plaintiffs,

v.

THE PUYALLUP TRIBE, *et al*,¹
Defendants.

Attorney for Plaintiff (Respondents herein):

JOSEPH L. CONIFF

Attorney for Defendant (Petitioners herein):

ARTHUR KNODEL
5505 20th Street East
Tacoma, Washington 98424

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
1963		
Nov. 12	Complaint filed,	5
Nov. 12	Temporary restraining order entered by Superior Court (trial court) restraining the Puyallup Indians from fishing within the exterior boundaries of the Puyallup Indian Reservation and at their usual and accustomed grounds and stations.....	7

1. The plaintiff improperly designated the Puyallup Indian Tribe as a corporation. The Puyallup Tribe of the Puyallup Reservation has never been incorporated, did not incorporate under the second branch of the Wheeler-Howard Act (25 USCA 477) and did not adopt a charter thereunder to be sued in any court of competent jurisdiction.

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
1963		
Dec. 3	Return on temporary restraining order and order to show cause on behalf of the Puyallup Tribe of Indians filed by defendant which was an answer to plaintiffs' complaint and motion to dismiss the restraining order and complaint raising question of jurisdiction. ²	8
1965		
May 27	Trial court filed its Memorandum of Opinion finding that a permanent injunction should be entered against the defendants.	11
Aug. 13	Trial court entered its Findings of Fact and Conclusions of Law.	30
Aug. 13	Trial court entered the judgment and decree permanently enjoined the Puyallup Indian Tribe from fishing the Puyallup River and Commencement Bay in any manner contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State Washington and the Department of Game of the State of Washington.	37
Sept. 7	Notice of Appeal from Superior Court (trial court) to Washington State Supreme Court.	38

2. Numerous other motions were made prior to trial during trial and after trial to dissolve the restraining order and challenging the jurisdiction of the Court and order entered denying the same.

DATE

PROCEEDINGS

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PAGE NOS.

1967

- Jan. 12 The Washington Supreme Court rendered its opinion. 39
- Mar. 15 Remittitur issued by the Washington State Supreme Court which made the judgement of the Washington Supreme Court final as of March 13, 1967. 68
- June 2 The Pierce County Superior Court (trial court) in its ministerial function entered the final order (Amended injunction) pursuant to the direction of the Washington Supreme Court wherein the Puyallup Tribe was permanently enjoined from drift net or set net fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington (the area referred to by said order includes that area within the exterior boundaries of the Puyallup Indian Reservation and at the usual and accustomed fishing station under the Medicine Creek Treaty). 69
- June 12 Petition for Writ of Certiorari filed with the United States Supreme Court.
- Dec. 18 The United States Supreme Court granted the Writ of Certiorari.

COMPLAINT (R. T. 1)

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF
WASHINGTON AND THE DEPARTMENT OF
FISHERIES OF THE STATE OF WASHINGTON,

Plaintiffs,

v.

THE PUYALLUP TRIBE, INC., a corporation,
JEROME MATHESON, Chairman; FRANK WROL-
SON, Vice-Chairman; ALICE BUBER, Secretary-
Treasurer; SILAS CROSS; FRANK WRIGHT;
ROBERT SATIACUM; CHESTER SATIACUM;
CHARLES SATIACUM; FLOYD BUFER; JOE
JOSEPH; JOHN JOSEPH; WALTER KOHEN; ALEX
LANDRY; FRANK LOZIER; ANDREW MOSES;
JACK MOSES; LEVI SANCHEZ, JR.; ALEXANDER
THOMAS; MARVIN THOMAS; NORBERT THOMAS,
JR.; ROBERT THOMAS; WARREN HARDING
BLINER; HENRY CROSS; ELIZABETH DANIELS;
HERMAN DILLIN; JANA DILLIN; KAY DILLIN;
RICHARD GEORGE; DON GEORGE; WAYNE M.
IVES; DOMINICK F. IVES; TOM JAMES; HARRY
JOHNS; CHARLES MATHESON; JOSEPH J. MATH-
ESON; JOHN TURNIPSEED; RUBIN WRIGHT;
ELAINE WRIGHT; JOHN YOUNG; and JOHN DOE
and JANE DOE, members,

Defendants,

No. 158069
COMPLAINT

Come now the plaintiffs, by and through their Attorney General, John J. O'Connell, and Assistant Attorneys General, Joseph L. Coniff and Mike Johnston, and for a claim against the defendants, state as follows:

I.

The State of Washington is a sovereign state of the United States, and that the Departments of Fisheries and Game thereof are charged with the duty of enforcing its laws, rules and regulations relating to the preservation,

conservation, and management of the food and game fishery resources of the state.

II.

The defendants are citizens of the State of Washington and of the United States of America.

III.

The Puyallup River is a river which flows through Pierce County in the State of Washington which sustains a large anadromous fish population.

IV.

The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Puyallup River.

V.

The defendants claim special privileges or immunities from the application of valid conservation laws of the State of Washington, to which they are not legally entitled. By virtue of the claimed special privileges or immunities, the defendants are fishing extensively in the Puyallup River and Commencement Bay with set nets and drift nets.

VI.

As a result of the defendants' fishery, the anadromous fish runs of the Puyallup River will be virtually exterminated if said fishery is permitted to continue.

The plaintiffs have no adequate remedy at law and the public will suffer permanent irreparable injury from the acts of the defendants.

WHEREFORE plaintiffs pray that the court declare that the defendants are not entitled to any privileges or immunities from the application of state conservation measures;

FURTHER, the plaintiffs pray that a temporary restraining order be issued enjoining the defendants from netting anadromous fish in Commencement Bay, the Puyallup River or any of its tributaries and directing the defendants not to hamper or molest in any way the anadromous fish runs of the Puyallup River;

FURTHER, that the court fix a time certain at which time the defendants shall show cause why they should not be enjoined and restrained during the pendency of this action from netting the runs of anadromous fish of the Puyallup River; and

FURTHER, that plaintiffs have judgment against the defendants permanently enjoining them from destroying the runs of anadromous fish of the Puyallup River system, and for such other relief as the court may deem just and reasonable.

JOHN J. O'CONNELL
Attorney General
 s/ JOSEPH L. CONIFF
 MIKE JOHNSTON
Assistant Attorneys General

Office and Post Office Address:
 115 General Administration Bldg.
 Olympia, Washington

**TEMPORARY RESTRAINING ORDER
 ENTERED BY SUPERIOR COURT (TRIAL COURT)**

(R: T. 2)

It appearing to the satisfaction of the court from the verified complaint of the plaintiffs that this is a proper case for a temporary restraining order and that unless the temporary restraining order prayed for in said complaint be granted, great injury will result to the plaintiffs before the matter can be heard on notice;

NOW, THEREFORE, IT IS HEREBY ORDERED that said defendants, and each of them, appear before this court in the department of the presiding judge at the hour of 10:00 A.M. on November 26, 1963, then and there to show cause, if any they have, why they and each of them should not be restrained and enjoined during the pendency of this action from netting food fish and game fish from the Puyallup River in accordance with the prayer of this complaint.

AND IT IS FURTHER ORDERED that, pending the hearing of this order to show cause, you and each of you

said defendants are hereby restrained and enjoined from netting food fish or game fish from the Puyallup River.

IT IS FURTHER ORDERED that a copy of the complaint herein, together with the summons, and of this order be served on each of the defendants herein.

Done in open court this 12 day of November, 1963.

Judge of the Superior Court

RETURN ON TEMPORARY RESTRAINING ORDER AND ANSWER TO COMPLAINT

(R. T. 3)

COMES NOW, the PUYALLUP TRIBE of INDIANS, by and through the Chairman of the Tribal Council, MR. JEROME MATHESON, and for their Answer to the Temporary Restraining Order and Order to Show Cause of the State of Washington makes their reply and return as follows, to-wit:

I.

Answering Paragraph No. 1 these defendants being a tribe of Indians signators to the Treaty of Medicine Creek deny that this is a proper case for a restraining order and deny that any great injury will result to the State of Washington. That this Tribe of Indians signed a treaty with the United States of America as a sovereign nation of Indians and under the articles of the said treaty they have exclusive right to the uses of the fish in the Puyallup River and that they are the owners of the fish in the said river and that it flows through the land which they reserved to themselves since time immemorial and that the State of Washington does not own the fish in the river and therefore couldn't possibly be injured by the Puyallup Tribe or its members taking fish from the said river.

II.

Answering Paragraph II the defendants admit the same and allege that there are many members of the Tribe who gain their livelihood through fishing in the Puyallup River and that this is a valuable property right which belongs to the Tribe and is exercised by the Tribe members under the Treaty of Medicine Creek and that this Court

should immediately dissolve the restraining order and order to show cause heretofore entered herein and award damages to defendants for their invasion of their treaty rights and their civil rights.

ANSWERING PLAINTIFF'S COMPLAINT

I.

Answering Paragraph No. I of the plaintiff's Complaint the defendant denies the same and alleged that the State of Washington has no jurisdiction or authority to interfere in any manner whatsoever with the fishing rights on the Puyallup River or its watershed.

II.

Answering Paragraph II defendant admits the same.

III.

Answering Paragraph No. III admits the same and alleges that the fish in the said river belong to the Puyallup Tribe of Indians and that the State of Washington has no authority and no jurisdiction to interfere with the fishing rights of the said Puyallup Tribe of Indians in any manner whatsoever.

IV.

Answering Paragraph IV denies the same and alleges that if plaintiff has expended sums on the Puyallup River they do so subject to the rights of the defendant, Puyallup Tribe of Indians and its members.

V.

Answering Paragraph No. V, the defendants deny the same and allege that the state of Washington and the plaintiffs in particular have conspired to unlawfully abridge, destroy and thwart the rights of the defendant, Puyallup Tribe of Indians and its members to fish under the Treaty of Medicine Creek and that the defendants have suffered numerous arrests, jailing and other indignities at the hands of the plaintiffs who knowingly and wilfully badger, abuse and degrade the defendants under color of state law which right, privilege and immunities are secured by the Constitution and laws of the United States and the Treaty of Medicine Creek.

VI.

Answering Paragraph VI defendants deny the same and allege that the plainiffs do not own the fishery which is extant in the Puyallup River and they have falsely claimed that the fish runs are declining when in truth and in fact the fish runs are increasing. That the plainiffs are recklessly using the power of the State of Washington to deprive the defendant and each of them of their means of making a livelihood which is secured to them by the Treaty of Medicine Creek and the Constitution of the United States of America. That the plaintiffs by their own statements and their own statistics they do not have figures to substantiate any marked decline in fish runs on the Puyallup River by the Indians. In truth and in fact the plaintiff cannot substantiate by facts and figures any of the conclusions to which they subscribe concerning any detrimental effect of the Indian fishery on the Puyallup River.

That the plaintiffs have knowingly and willfully undertaken to deliberately harass, annoy and abuse defendants for political reasons although in previous actions the Supreme Court has ruled against them consistently and in truth and in fact they have no jurisdiction to interfere with the rights of the Indians. That the Puyallup Tribe of Indians own the fish in the river so that the plaintiffs couldn't possibly be hurt in any manner whatsoever by the fishing of the Puyallup Tribe of Indians in the Puyallup River.

WHEREFORE defendants pray that the restraining order be dismissed; that the show cause order and complaint be dismissed; and that the defendants be given their costs and disbursements herein incurred and damages caused by this unlawful interference with their fishing and civil rights.

**TRIAL COURT'S
MEMORANDUM DECISION**

(R.T. 20)

(Caption omitted.)

John D. Cochrane, filed May 27, 1967

A few days before Christmas in 1854, Governor Stevens, representing the United States, met with representatives of the Nisqually and Puyallup Indian tribes, on the banks of Medicine Creek, and negotiated a treaty concerning land and hunting and fishing rights. The treaty was reduced to writing and signed by the authorities of the Government. It was also signed by the Indians representing their tribes, but since they could neither read nor write, their signatures were merely indicated by their mark (Ex. "A"). This treaty was ratified by President Pierce in 1855. At this time there were only a few white settlers, and the Puyallup Indians consisted of various groups with villages along the river and on the shores of Commencement Bay. Any ownership of land the Indians may have had was communal in nature.

At that time the river flowed peacefully into Commencement Bay; there were no dams on the river, no factories, no lumber mills, no commercial and industrial developments, no municipal sewage—nothing such as exists today.

The Puyallup Indians who inhabited the lower reaches of the river and the area around Commencement Bay depended for their subsistence, to a large degree, on the fish they caught in these waters and the shellfish they found on the shores.

Article 3 of the Medicine Creek Treaty provides as follows:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,*

That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter."

Now, over a hundred years later, we are concerned with the rights of the defendants under this Article of the treaty.

Since the beginning of this action, the defendants have sought to have the same dismissed, on the grounds that this court does not have jurisdiction. This motion to dismiss has heretofore been denied, and the court adheres to the previous rulings herein on that point without further comment.

Three primary questions are presented to this court for determination. They are:

1. Is there a Puyallup tribe which succeeds in interest to the rights of the signers of the Treaty of Medicine Creek?

2. Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

3. Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

It may be that the answer to any one of these questions would obviate the necessity of answering the others; however, in view of the facts and law involved, and the interest of the parties in the answers to all three questions, the court proposes to answer each one.

In answering these questions, it is necessary to look at the facts and the law as they exist today, and not as they existed over 100 years ago or even 50 years ago, as many changes have occurred in the intervening years.

QUESTION No. 1:

According to the testimony of Dr. Herbert C. Taylor, Jr., an anthropologist and Dean of Western Washington College, in 1790 there were about 800 to 1000 Puyallup Indians; in 1839 there were 484, in 1844, 207, and by 1854, at the time of the signing of the treaty, there were about 100.

Dr. Taylor says the lower Puyallup Indians were assimilated into the white development of the area and were destroyed as a cultural identity.

He defines a tribe as "A group of a simple kind, in a definite locality, speaking a common language, with a single government." The Puyallups in 1854 were a tribe, but are not now by this definition. They can only be identified now by inheritance.

Dr. Colin E. Twedell, also an anthropologist, was able to trace many of the individuals listed in the 1929 roll of Puyallup Indians by at least some degree of blood, back to the original signatories of the treaty. Dr. Taylor says that the Puyallup Indian culture is dead—that the only thing that survives are memories. They are now Americans by "cultural assimilation;" what was two cultures has become blended into one.

Defendants contend there is a present, existing Puyallup tribe evidenced by their tribal roll of 1929 (Ex. "H") and that it has been recognized by the Federal government, and only Congress can terminate their tribal existence. There are 344 members according to the 1929 roll.

Recognition for one purpose does not mean, however, that there is recognition for all purposes. The fact that the government would take cognizance of a tribal roll for distribution of funds does not mean recognition as successors to the rights of signatories to the treaty. The testimony at the trial indicated that the roll was prepared to cover the distribution of funds, and that blood quantum was not a necessary prerequisite for inclusion in the roll.

Is the present Puyallup tribe any different than say the Italian-American Club, the Order of Ahepa, or Sons & Daughters of Norway? The fact that some blood relationship may be required by one organization and not by another, doesn't alter the fact that the purpose may be merely social, fraternal, et cetera.

It is urged that the tribe is more than this because they have a communal right granted by the treaty which carries on down to the present time.

The evidence indicates, however, that most of the matters considered at meetings of the tribe, or tribal council,

deal with enrollment, operation of the cemetery, and the disposition of trust funds.

The only Indians who appear to assert their rights to fish, are the individual defendants other than the tribe itself. In an effort to establish the ownership of a fishing right, some of the Indians paid to the tribe a fee of \$25.00 for the right to fish for a year, but there was no effort to enforce the licensing fee, and its collection was dropped. It thus appears that except as they are actively defending this suit, the tribe has not in fact at any time before asserted its communal ownership of fishing rights.

The defendants in this case are no longer wards of the government. They are citizens of the United States, and over the years have blended their status with all other citizens to the extent that they no longer retain any exclusive rights that were granted by the treaty. To say that they have any superior rights to others would make them super citizens, enjoying rights and privileges not given to others in the community.

At the time of signing the treaty, it would probably be safe to say that they were savages. Savage, as defined in Webster's 3rd International Dictionary, is "a person living in a primitive state or belonging to a primitive society."

Would anyone assert that they are savages now? Certainly not, and they would be justifiably insulted if anyone would do so.

They are citizens of our county and state, with all the rights, privileges and responsibilities of any other citizen, no more—no less.

What have our courts said about continued recognition of a tribe? The case of *United States v. Sandoval*, 58 L.Ed. 107, a 1913 case, has been relied upon by both sides in discussing this question. The case arose out of a criminal prosecution for the sale of intoxicating liquor to the Pueblo Indians in the state of New Mexico.

The court pointed out that the lands belonging to the several Pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership.

This alone would distinguish the Puyallup Indians from the Pueblos.

Further identifying the Pueblos, the court said:

" Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."

In 1854, the Puyallups could probably be distinguished from the white settlers on each of these characteristics, but as to each of these characteristics in 1965, there is nothing to distinguish the Indians from any citizen of the country.

The court further pointed out that the Pueblos were simple and ignorant people, dependent upon the fostering care and protection of the government, and there was even a New Mexico statute which excluded them from the privilege of voting.

By contrast, the present Puyallups are not simple and ignorant, are not dependent upon the care and protection of the government, and have equal voting rights with all other citizens.

The court went on to say:

"It is for Congress, not the courts to determine when the true interests of the Indian require his release from guardianship. It is only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts."

The Puyallups are not now wards of the government, are not distinctly Indians from the point of view of their status as citizens, and, therefore, this court can determine for itself how they should be recognized and dealt with.

The right of the courts to deal with Indians directly, considering their changed status was dealt with in three

early cases by Judge Hanford of the U.S. District Court for the Western District of Washington.

The first was that of *United States v. Kopp*, 100 Fed. 160, a 1901 case.

Judge Hanford there said:

"... Since the decision of the circuit court of appeals in that case (*Ross v. Eells*, 56 Fed. 855) the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes. The circuit court of appeals agreed with this court in holding that the sixth section of the act of February 8, 1887, confers the right of citizenship upon the Puyallup Indians to whom lands were patented under the treaty of 1854; and, so far as the opinion delivered by Mr. Justice McKenna indicates the mind of the court, there is no disagreement with this court as to the nature of the estate granted by the patents. I feel justified, therefore, in adhering to the conclusion reached in that case,—that each patent conveyed a title in fee simple, subject to forfeiture upon conditions subsequent, and with a restriction upon the right of alienation for a period to be determined by future legislative enactments."

The court said:

"The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States having all the rights, privileges and immunities of other citizens, and they are not under guardianship of the United States government, nor under the charge of any Indian superintendent or agent."

United States v. Ashton, 170 Fed. 509 (1909), was an

action to quiet title to certain land, where the court held that although the tribe had not been dissolved by any formal proceeding, it was disintegrated by the enfranchisement of its members. This case will be referred to again under the question concerning the existence of the reservation and its boundaries.

In re Celestine, 114 Fed. 551 (1902), the court said.

"... Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the Negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the Supreme Court, in an opinion written by Mr. Justice Bradley, has said:

" 'When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.' Civil Rights Cases, 109 U.S. 25, 3 Sup. Ct. 31, 27 L.Ed. 844."

It is urged that the treaty with the Indians was a treaty with a separate nation and that as such only Congress can make or change treaties—this despite the fact that the Indians individually and as a tribe, so far as that term is applicable, are within the territorial limits of the United States, and the Indians are now citizens of the United States as well.

Montoya v. United States, 45 L.Ed. 521 (1901), discusses Indians as nations in the following language:

"The North American Indians do not, and never have, constituted 'nations' as that word is used by writers upon international law, although in a great number of treaties they are designated as 'nations' as well as tribes. Indeed, in negotiating with the Indians the terms 'nation,' 'tribe,' and 'band' are used almost interchangeably. The word 'nation' as ordi-

narly used pre-supposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word 'nation' a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."

The Puyallup tribe clearly does not qualify as a "nation" as pointed out by the court in that case, and this argument about the tribe being a sovereign nation is without merit.

The case of *Oklahoma Tax Com. v. United States*, 87 L.Ed. 1612 (1943), involves the right of the state to impose inheritance taxes on the estate of deceased Indians.

The court held that although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy. They are actually citizens of the state with little to distinguish them from all other citizens.

These Indians as well as the Puyallups, have a state that supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. indeed, if need be, they are eligible for welfare as well.

Having accepted the same benefits of other citizens, by becoming citizens and no longer being wards of the government, are they also entitled to retain benefits not afforded to other citizens? This court thinks not. By all the changes over the years, the tribe has lost its identity as a successor in interest to the treaty, and has accepted equal footing as citizens with no special privileges not available to all.

Our own court, in an early case, decided the status of individual Indians. *State v. Smokalem*, 37 Wash. 91 (1904). The case arose on the question of whether or not the state had jurisdiction in a criminal case over an Indian who committed a crime against the person of another Indian within an Indian reservation. In this case the court said:

"... In 1883 or 1884 the lands on this reservation were allotted to the Indians in severalty, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, all restrictions against the alienation of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by the same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor customs. They had abandoned their tribal relations, so far as lay within their power, and had assumed the habits and customs of the whites among whom they dwell. The reservation is divided into school districts and precincts; some, at least, of the Indian children attend the public schools maintained under the general laws of the state; precinct officers, such as justices of the peace and constables, are elected and perform the duties of their

offices, in their respective precincts. The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to."

The case holds that an Indian who has severed his tribal relations and assumed the habits and customs of the whites, is no longer a member of the tribe.

At page 95, the court said:

"... It is not to be supposed that Congress intended that the remnant of a band of Indians, like the Puyallups, without tribal relations, without laws or customs, and without government to administer them, should be left to prey upon each other and upon society at large, without restraint or fear of punishment from any source, unless they should commit one of the felonies enumerated in this act."

While this case dealt with the status of an individual only, nevertheless it and the other case law, together with the facts showing the change over the past 100 years, leads this court to the conclusion that there is no Puyallup tribe which succeeds in interest to the rights of the original signers of the Treaty of Medicine Creek.

We turn now to the second question: Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

At page 17 of the brief of the defendant *Satiacum*, it is asserted that the Puyallup Indian tribe owns the tidelands abutting on, or appurtenant to their original reservation established by treaty and executive order to "extreme low water." Indeed, it is probably necessary for the defendants to make this assertion, or otherwise they would be trespassing in their pursuit of their fishing activities.

But what about the owners of the lands along the shores of Commencement Bay, and the banks of the Puyallup River? Are the homes, factories, mills, warehouses,

parks, et cetera, et cetera, encroaching on the property of the Indians?

The reservation established for the Puyallup Indians covers an area from Pt. Defiance along Commencement Bay, up the Puyallup River for several miles, across it and then along the north side of it, and Commencement Bay to Brown's Point (Pl's Ex. 12; Def's Ex. "0").

Article 6 of the Treaty of Medicine Creek provides:

"The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor."

In 1887, Congress passed the General Allotment Act (24 Stat. 388), authorizing the division of reservation land among individual Indians with a view towards eventual assimilation into our society.

In 1893, Congress passed the Puyallup Allotment Act (27 Stat. 633) which established a commission to allot the lands of the reservation to the Indians in severalty, and set up a ten-year trust period from the date of passage of the act (March 3, 1893) during which time the

allottees would not have the power to alienate their individual tracts.

Some question having been raised as to title when sales were made under this act, Congress in 1904 passed the so-called Cushman Act (33 Stat. 565). This act provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation for a period of ten years from the date of the passage thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon their sale by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

"Approved, April 28, 1904."

The law seems to be clear, that a reservation cannot be changed or done away with, except by an Act of Congress. The question, therefore, seems to be whether or not the acts of Congress referred to, did, in fact, do away with the reservation when sales were made by Indian allottees.

Mr. Louis J. Burkey, an officer of, and attorney for the Tacoma Title Company, testified concerning a reservation and stated that reference is always made to the fact that certain land is within the Puyallup Indian Reservation and that he knew of no act which removed the existing boundary lines of the reservation. It appears to the court, that his testimony merely indicates that reference to the reservation is made simply as a geographical reference point.

He further testified that in conveyances covering lands within the original reservation boundaries, there are no restrictions or references to any fishing rights. In other

words, title is free from any claim of any Indian as to fishing rights, ownership of tidelands, access rights, or any other claim that could be asserted, based upon the Medicine Creek Treaty.

An early case of *United States v. Celestine*, 54 L.Ed. 195 (1909), is relied upon by defendants. This was a criminal case in which the crime was committed on the Tulalip Indian Reservation.

Although a patent had been issued, the tracts remained within the reservation. The court said:

"When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

However, the treaty with the Tulalip Indians provided for only a *conditional* alienation of the lands, making it clear that the special jurisdiction of the United States had not been taken away.

The defendants also rely on *United States v. Winans*, 49 L.Ed. 1089 (1905). In this case the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purposes mentioned.

The case holds that the right secured to the Indians could not be extinguished by the United States or the state in granting patents to land, but says nothing of effect of allotments and sales by Indians.

An early case dealing directly with the question of whether the reservation had been abolished by allotment and sale is *United States v. Kopp*, 110 Fed. 160 (1901), referred to earlier in this opinion. In that case Judge Hanford dismissed a charge against Kopp for selling liquor to a Puyallup Indian. He held that the United States had not proved the vendor to be a Puyallup Indian. The judge said:

"Since the decision of the Circuit Court of Appeals that case (*Eell v. Ross*, 64 Fed. 417), the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the Act of 1893 above referred to. It is cer-

tain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and *I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes.*" (Emphasis supplied.)

The same judge in the case of *United States v. Ashton*, 170 Fed. 509 (1909), a quiet title action, said:

"Every one of those patents extinguished all the rights of the tribe as a community with respect to the tract of land conveyed by it. The fishing rights secured to the Indians by the treaty, were by its express declaration a mere privilege to be enjoyed in common with all citizens and logically antagonistic to any claim of an exclusive or adverse right and entirely lacking in all of the essentials of a grant of an inheritable estate."

By this case, title to the tidelands was quieted in defendant as against any claims of the Indians.

A very recent case is that of *Klamath & Modoc Tribes v. Maison*, 338 F.2d 620 (1964), construing a Termination Act of Congress providing for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians. The case is important as to the extent of termination of Indians' rights upon termination of a reservation. The court said:

"We agree that the Termination Act has not expressly dealt with any treaty rights respecting hunting and trapping. It has, however most certainly reduced the area to which these rights attach. By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, *supra*, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. *Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.*" (Emphasis supplied.)

To the same effect is *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963). The intent of Congress as to the status of Indians is evidenced by House Concurrent Resolution 108, 83rd session, which states in part:

"Whereas it is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

"Whereas, the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: . . ."

What is a reservation? It has been defined in the case of *United States v. McGowan*, 82 L.Ed. 410 as follows:

"An Indian reservation consists of land validly set apart for the use of Indians, under the superintendence of the Government, which retains title to the lands."

In the case at bar, there is neither superintendence or retained title as to the alienated lands.

Our own court has considered this question in *State v. Satiacum*, 50 Wn.2d 513. In that case Judge Donworth said:

"We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup River, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the original Puyallup Indian reservation, in view of the decision in the *Pioneer Packing Co.* case."

Defendants say that this is a *res judicata* of the question, and if this were so, this court would feel it was bound by this opinion. However, Judge Hill, in that case said that there is no majority opinion. He went on to say:

" . . . nothing is decided except that the order dis-

missing the charges against the defendants is affirmed."

This court therefore takes the position that it is not bound by Judge Donworth's statement. It is the opinion of this court that the Puyallup Allotment Act of 1893 (27 Stat. 633) and the Cushman Act of 1904 (33 Stat. 565) in effect abolished the reservation and any fishing rights attached thereto as to any land sold subsequent to the allotment to individual Indians.

By these Acts, Congress evidenced, by the only means possible, its intent to abolish the Puyallup reservation through alienation. All the lands within the original boundaries of the reservation which have been sold are, therefore, no longer a part of the reservation, and all fishing rights claimed as being appurtenant to those lands have been abolished.

Turning now to the third question:

Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

At the outset, the court recognizes that there is a line of cases requiring the state to show that the regulations are "indispensable" in the conservation of fish, and this will be touched on later.

In this case we are dealing with salmon and steelhead fish which are known as anadromous fish. Anadromous fish may generally be defined as fish that are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn.

At the time of the Medicine Creek Treaty, in 1854, the Puyallup Indians were fish and shellfish eaters, and depended largely on them for their subsistence. This was their only need for the fish except for a minor amount of bartering. It is safe to say that present conditions were not contemplated when the treaty was negotiated and signed. As Judge Rosellini said in *State v. Satiacum*, *supra*:

"Inherent in the treaty is the implied provision that neither of the contracting parties would destroy

the very right and bounty which each ought to share."

While Indians apparently were fishing in the manner sought here to be enjoined, in the years following 1934, it was not until 1953 that any difficulty arose. This was due to the fact that much of the fishing was done at night, and it was not until about 1953 that a regulation required fish buyers to report their purchases as to locations and from whom purchased, thus bringing their commercial sales to the attention of the state.

Fishing was done at night prior to the introduction of monofilament nets which are practically invisible in the water and snare the fish by the gills as they swim into them on their way up the river. Nets used prior to the introduction of this material were visible to the fish and they tended to avoid them, thus making night fishing more effective.

Much evidence was introduced by fish and game protectors, and by fisheries experts of both Washington and Oregon concerning the manner of fishing practiced by the Indians and the need for regulation of fishing.

The waters of Commencement Bay and the Puyallup River are part of the Puyallup Preserve. No commercial fishing is allowed, and sport fishing is, by regulation, confined to hook and line. Evidence shows that the Indians use set nets near the mouth of the Puyallup in Commencement Bay and in the river itself. These nets are as long as over 100 feet and deep enough to practically touch bottom. They are fastened to fixed objects, such as pilings or bridge abutments, and are tended from time to time by being lifted out of the water, and the fish removed. Other nets used in the Puyallup River are drift nets that extend from one side of the river to the other, and are allowed to drift downstream, snaring fish in their webbing as they go. The fish caught are used personally, but a large number are sold commercially.

The complaint of the state is that this method of fishing is against state regulations and has the effect of depleting or ruining the salmon runs.

As has been pointed out, originally the Indians only

took enough fish for personal use and barter, which was inconsequential compared to the present demand for fish.

In order to maintain the run of fish, it is necessary to keep a proper balance of returning fish to the spawning grounds. Evidence indicated that there have been less and less returning fish from 1952 to 1964. The return went up sharply in 1964 because net fishing was curtailed at the mouth of the Puyallup River by a court injunction. The evidence indicates, however, that the Indian catch of salmon and steelhead is only about 3 to 5 per cent of the total.

It is argued by the defendants that commercial and sport fishing should be curtailed more, and that pollution in the streams, dams and dredging of the river, et cetera, cause the killing and depletion of fish runs, and not Indian fishing. The state argues, however, that all segments of the fishery must be regulated, and that pollution, dams, et cetera, are also regulated and taken into consideration in the over-all conservation program.

Fish swimming freely in the waters are now owned by anyone. Title is obtained when possession is obtained. We are here dealing, however, with a natural resource made available through the rivers and streams, and the right to regulate the fishing thus made available, and of thereby obtaining title to or ownership of the fish.

If the state has the right to regulate, the courts have adopted different rules as to what regulations may be adopted in order to preserve fish runs. *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (1951).

The defendants rely upon the case of *Maison v. Umatilla*, 314 F.2d 169 (1963), and contend that this court should adopt that rule. That case held that it is necessary for the state to show that the regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation. This court rejects this rule as being too strict, and imposes a burden on the state which is impossible to meet.

The case of *Tulee v. Washington*, 86 L.Ed. 1115 (1942), was one where Tulee was charged with fishing without a license. It was held that the state has power

to regulate the manner of fishing to conserve fish, but can't charge a license fee. This case is also authority for the proposition that the treaty did not give the Indians the right to fish unrestricted and free of any state regulation.

The conclusive case on this question so far as the state of Washington is concerned, is *State v. McCoy*, 63 Wn. 2d 421 (1963). Here, the defendant was fishing in much the same manner as were the defendants in the case at bar. At page 427, the court said:

"One essential of a conservation program is the regulation of the harvest of salmon in salt and fresh water areas. It is regulation that provides the escapement necessary to maintain a perpetual supply of salmon for the harvest by all people. If a fishery, within a river or off its mouth, harvests too many of the adult salmon because of the shallow confined nature of the fishing area and the habits of the salmon which cause them to school up and delay in these areas prior to ascending the river, there will be little escapement to perpetuate the runs. An uncontrolled fishery in such areas may harvest almost the entire run of a fishery resource. Salmon are not inexhaustible and without their proper escapement for reproduction from year to year through controls in the harvest, the stocks will be reduced to a point where only a remnant run will exist."

This language applies with equal force to the situation sought to be regulated in the case at bar. The case holds that the state has the power and the right to subject Indians to reasonable and necessary regulations for the protection of the fishing resource.

Without reviewing the evidence in this case, it is clear to the court that a large number of fish must survive back to spawning grounds regardless of pollution, predators, logging, dams, et cetera, and Indian net fishing prevents such survival. It is necessary to prohibit all non-sport fishing in Commencement Bay and the Puyallup River in order to conserve the fish. While there no doubt is pollution and other man-made activities on the river that do adversely affect the fish, these in themselves

are not lethal, and any regulations covering any phase of fish protection are in vain unless the state also controls fishing in Commencement Bay and the Puyallup River.

Indians' unregulated gill net fishery in the Puyallup River has caused serious damage to the fish runs indigenous to that stream, and will, if permitted to continue, cause irreparable harm in that the fishery resource will be unable to sustain itself, in accordance with the basic principles of conservation. It follows that the regulations sought to be imposed by the state prohibiting net fishing in Commencement Bay and the Puyallup River are reasonably necessary for the preservation of salmon and steelhead fish.

From the answers to the questions in this case, the court concludes that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that a permanent injunction may issue enjoining the defendants from netting anadromous fish in Commencement Bay, the Puyallup River, or any of its tributaries.

DATED at Tacoma, Washington, this 27th day of May, 1965.

JOHN D. COCHRAN, *Judge*

FINDINGS OF FACT AND CONCLUSIONS OF LAW (R.T. 4)

The matter coming on regular for trial this 1st day of February, 1965, the plaintiffs being represented by JOHN J. O'CONNELL, Attorney General and JOSEPH L. CONIFF and MIKE JOHNSTON, Assistant Attorneys General and the Puyallup Indian Tribe being represented by Attorney ARTHUR R. KNODEL and the defendant, ROBERT SATIACUM being represented by FREDERICK A. CONE and MALCOLM McLEOD and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, hereby makes the following

FINDINGS OF FACT

I.

This action was commenced by the Department of Fisheries and the Department of Game of the State of Washington. The complaint alleged that the defendants were net fishing in the Puyallup River watershed and Commencement Bay in Pierce County, Washington. It was further alleged that the defendants were not entitled to any special privileges or immunities from any valid state conservation law, rules, and regulations and if the defendants' net fishery were permitted to continue it would cause irreparable damage to the anadromous fishery resource indigenous to the Puyallup River watershed and Commencement Bay. Plaintiffs alleged that they had no adequate remedy at law for defendants' actions.

Defendants answered and alleged that they were members of the Puyallup Tribe of Indians; denied that they were subject to the conservation laws, rules, and regulations of the plaintiffs; denied that their net fishery threatened the anadromous fish runs of Puyallup River watershed and Commencement Bay or that irreparable injury would result from their actions. As an affirmative defense, the defendants alleged that all of the acts that they had performed were done in their capacity as members of the Puyallup Tribe of Indians and that their ancestors negotiated a treaty with Territorial Governor Isaac I. Stevens (II Kappler ool) which treaty reserved to them "the right of taking fish at usual and accustomed grounds and stations" and that consequently they were not amenable to state conservation measures. The defendants further alleged that by virtue of the treaty, *supra*, and subsequent executive orders of the President of the United States that they possessed the exclusive right to fish free from any state regulation, within the exterior boundaries of the Puyallup Indian Reservation. The defendant, Robert Satiacum, by cross-complaint, sought several million dollars in damages against the State of Washington for interfering with his asserted right to fish. The defendant, Robert Satiacum, took a voluntary non-suit at the close of the trial.

Plaintiffs denied that defendants were successors in

interest to the Puyallup Tribe which was signatory to the Treaty of Medicine Creek and therefore defendants would not possess treaty fishing rights. Plaintiffs further denied that the Puyallup Indian Reservation presently exists. Plaintiffs further asserted that if defendants were possessed of any treaty fishing rights, those rights were subject to reasonable and necessary state conservation laws, rules and regulations and that the laws, rules and regulations sought to be enforced were both reasonable and necessary to preserve and conserve the anadromous fishery resources of the Puyallup River watershed and Commencement Bay.

II.

That in aboriginal times a band of Indians lived in the Puyallup River watershed. These Indians lived in several villages along the Puyallup River and had a primitive culture as did all Southern Puget Sound Indians in aboriginal times. They spoke a distinct dialect of Salishian language, the root language spoken by all Southern Puget Sound Indians.

III.

The Indians that lived along the Puyallup River in aboriginal times employed weirs, traps, nets, spears, and gaffs in their fishery and all such instrumentalities were far less refined and far less efficient than the modern equipment used by the defendants in fishing today which consists of modern nylon nets.

IV.

About 1790 approximately 800 to 1,000 Indians lived in the villages located in the Puyallup River watershed. In 1839 a Hudson's Bay Company census indicated that there were 484 Indians residing in the Puyallup River watershed. In 1844, a later census by the Hudson's Bay Company indicated that 207 Puyallup Indians resided in this area. In 1854, the year before the Treaty of Medicine Creek was signed, the Gibbs' census indicated that the Puyallup Indian population in this area had dwindled to 100. Of this number approximately 50 Puyallup Indians lived in villages located near Commencement Bay and 50 lived in the upper Puyallup River area.

V.

Around the year 1790 the horse was introduced to the upper Puyallup River area by the Sahaptin-speaking Indians who resided east of the Cascade Mountains. Trading began between the Sahaptin-speaking Indians and those who reside in the upper Puyallup River area. By the year 1830 the upper river Puyallups had become agriculturally oriented and utilized the horse in their economic life and as their principal method of travel, communication, and trade, in contrast to the lower river Puyallup Indians who relied on water transportation and had a subsistence economy consisting primarily of shellfish and fish.

VI.

During the period prior to the signing of the Treaty of Medicine Creek, and concurrent therewith, the lower river Puyallup way of life was being rapidly submerged into the dominant Western-European culture of the white settlers who were coming into this area in ever-increasing numbers.

VII.

The lower Puyallup were totally destroyed as a separate cultural entity shortly after the Indian wars of 1855-1856. The upper river Puyallup moved to the old Puyallup Indian Reservation established by executive order, pursuant to the terms of the Treaty of Medicine Creek. At the time of the removal of the upper river Puyallups to the reservation, no trace was left of the lower Puyallup Indians.

VIII.

The generally accepted anthropological definition of a "tribe," and the one which this court accepts, is: a group of a simple kind, in a defined locality, speaking a common language, with a single government. While the upper Puyallups met this definition as of the time that they moved to the old Puyallup Indian Reservation, they do not constitute a "tribe" today.

IX.

While certain of the individual defendants may be identified as blood line descendant members of the ab-

original Puyallup tribe, these individuals exhibit none of the primitive, savage, simple, and ignorant characteristics of members of the aboriginal Puyallup Indian tribe. The defendants do not speak the Puyallupi language but rather speak English. They, and their children, attend public schools, supported by the State of Washington. They depend, as all other citizens of the state for all of the governmental services made available by the state.

X.

While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club or the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with regard to membership, operation of a cemetery, the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.

The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma.

XI.

In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendency was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the

benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal organization known as the "Puyallup Tribe" at this time.

XII.

All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres.

XIII.

That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

XIV.

The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

XV.

The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

XVI.

That the place, time, and manner of fishing by the defendants was and is in violation of the rules and

regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

XVII.

That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.

XVIII.

It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

FROM THESE FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:"

I.

There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

II.

That the federal organization known as "the Puyallup Tribe of Indians" was not signatory to the Treaty of Medicine Creek and that any blood line descendants of the aboriginal Puyallup Tribe who also may be members of the present day federal organization have no rights by virtue of said treaty. That the guardian-ward relationship between the United States Government and the defendants was severed when the lands comprising the Puyallup Indian Reservation were authorized to be sold in 1903. That the Puyallup Indian Reservation no longer exists and that the state has assumed total and complete jurisdiction over all lands situated within its boundaries.

III.

That the anadromous fish conservation program of the State of Washington, as it affects the Puyallup River watershed and Commencement Bay, is an integral and

necessary part of an overall state conservation and preservation program for anadromous fish.

IV.

It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

V.

That to permit the defendants to fish as they have done since 1953, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Puyallup River watershed and Commencement Bay.

VI.

That the defendants and all members of the federal organization known as the "Puyallup Tribe" should be permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the conservation laws, rules and regulations of the State of Washington.

Done in open court this thirteenth day of August, 1965:

s/JOHN D. COCHRAN
Judge

JUDGMENT AND DECREE OF TRIAL COURT ENJOINING DEFENDANTS

(R.T. 25)

The above-entitled matter having come on regularly for trial before the undersigned judge, sitting without a jury on the first day of February, 1965, the plaintiffs being represented by John J. O'Connell, Attorney General, and Joseph L. Coniff, and Mike Johnston, Assistant Attorneys General, and the defendants being represented by Melvin M. Belli, Frederick A. Cone, Arthur Knodel, and Malcolm McLeod, and the court having heard the evidence and the arguments of counsel being fully advised in the premises, and the court having entered its

Findings of Fact and Conclusions of Law now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED That plaintiffs shall recover their costs and disbursements incurred herein.

DONE IN OPEN COURT this 13th day of Aug., 1965.

s/JOHN D. COCHRAN
Judge of the Superior Court

**NOTICE OF APPEAL TO STATE
SUPREME COURT**

To the Clerk of the above-entitled Court, to plaintiff and to John J. O'Connell, Attorney General, Larry Coniff and Mike Johnson, Assistant Attorneys General, plaintiffs' attorneys.

Take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of Washington from the judgment rendered and entered in said action on the 13th day of August, 1965, in favor of the plaintiff and against defendant and from the whole of said judgment.

DATED this 7th day of September, 1965.

MAJORITY AND DISSENTING OPINIONS OF THE SUPREME COURT OF WASHINGTON AND JUDGMENT

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, John D. Cochran, J., entered August 13, 1965. *Reversed in part.*

Action for a declaratory judgment. Defendants appeal from a judgment in favor of the plaintiffs.

HILL, J.—The Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, brought this declaratory judgment action¹ for the purpose of determining whether certain named individuals had, as members of the Puyallup Indian Tribe, any privileges or immunities from the application of state conservation measures.

The defendants asserted rights under Article 3 of the Treaty of Medicine Creek (10 Stat. 1132) between the United States and various Indian tribes including the Puyallups. This treaty was signed December 26, 1854; ratified by the United States Senate March 3, 1855, and proclaimed by the President of the United States April 10, 1855. This treaty was the first of a group of 11 treaties negotiated with the Indian Tribes of the Pacific Northwest between December 26, 1854 and July 16, 1855.

By the treaty, the Puyallup Indians ceded, relinquished and conveyed to the United States "all their right, title, and interest in and to the lands and country occupied by them," in return for which they received a reservation and certain rights, including those named in article 3 which reads:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Ter-

1. The case caption is erroneous, there being no entity known as "The Puyallup Tribe, Inc., a corporation." The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council.

ritory,² and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

The trial court concluded that the Puyallup Tribe no longer existed as an entity and that its members no longer had any rights under the treaty; that there was no longer any Puyallup Indian Reservation and, hence, that the Puyallup Indians had no fishing rights within what had been the reservation; and that

It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis. (Finding No. 4)

Consequently, the trial court permanently enjoined the defendants and all members of the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws of the State of Washington, or contrary to the rules and regulations of the Departments.

From that judgment, the Puyallup Indian Tribal Council appeals.

It is first urged that the state Departments are not entitled to seek relief under the Uniform Declaratory Judgments Act (R.C.W. 7.24.010 *et seq.*). Basically, the contention is that the issues here before us for determination should be raised in individual criminal actions brought against Indians who violate the food fish and game fish conservation laws found in Titles 75 and 77 R.C.W., or the regulations promulgated thereunder.

(1) A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent

2. Each of the treaties with the Indians in Washington Territory preserved to the Indians the right to take fish exclusively in the reservations and at all usual and accustomed places (or, as in the treaty with which we are here concerned, "at all usual and accustomed grounds and stations"), in common with citizens of the Territory, or variably in common with citizens of the United States.

hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.

Since the Indians who claim immunity from these regulations claim them under the treaties between the United States and various Indian tribes, it seems to us that the state Departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act.

On the merits, both parties assume an extreme and adamant position.

The Departments take the position that the Indians never had, as against the United States, any right to the "use and occupancy" of any land; that they were and are a conquered people, without right or title to anything. Having nothing to cede, there was no consideration for any promises made to them, and there is no necessity to respect those promises even though they were labeled "treaties."

(2) Our answer³ is that regardless of whether treaties with Indian tribes were necessary, they were deemed desirable by the United States and those entered into by it cannot be repudiated by this state or its courts.

3. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 55, 91 L.Ed. 29, 67 Sup. Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view of the majority opinion as to Indian rights and title in the aboriginal lands "when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land," does not suggest the abrogation of the treaties which have been ratified.

We commend, too, as an answer to the "hard-boiled" argument of the Departments, the article on "Original Indian Title" in "The Legal Conscience," a volume of the selected papers of Felix S. Cohen (pp. 273-303), in which he points out that the *Tillamooks* case, *supra*,

"... gives the final coup de grace to what has been called the 'menagerie' theory of Indian title, the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. . . ."

The case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 273, 99 L.Ed. 314, 317, 75 Sup. Ct. 313, 314 (1955), on which the Departments rely, points out specifically that there were no treaty rights involved and says:

This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force. . . .

Nor is there anything in *Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L.Ed.2d 573, 581, 82 Sup. Ct. 562, 569 (1962), also relied upon by the Departments, which contains any suggestion that the United States is now [sic] about to allow a state to repudiate any treaty which the United States has made. The opinion does point out that,

In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 26 U.S.C. §71.

and that there were no treaties with Alaska Indians. It should also have pointed out that the same enactment provided that "no obligation of any treaty lawfully made and ratified" with an Indian tribe prior to March 3, 1871, was "invalidated or impaired." The opinion does not directly or by inference imply that the United States was just playing "Treaty" with the Indians when the Senate ratified and the President proclaimed the treaty here in question. It was not the Indians, but the United States and the white settlers in the Territory of Washington who were asking for this and other treaties in 1854 and 1855.

The Departments further urge that if the Puyallup Indians ever had any fishing rights as such, their rights in the reservation area long ago ceased to exist; that the members of the Puyallup Tribe are all citizens of the United States and the State of Washington and have no rights different from any other citizen.

The defendants, on the other hand, urge that they have rights under the Medicine Creek Treaty to fish on the reservation and at other "usual and accustomed grounds and stations" at any time and with any type of gear they choose and that they do not have to comply with any

regulation, or if they have to recognize any regulation it must be "indispensable" to the preservation of the fishery. (This last position is posited on *Maison v. Confederate Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), which will be discussed later in this opinion.)

The observation of Mr. Justice Black in *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941), is still apropos:

We think the state's construction of the treaty is too narrow and the appellant's too broad; . . .

The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, notwithstanding their contentions to the contrary.

We will now consider whether the trial court erred in reaching the conclusion:

There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek (Conclusion of Law No. 1).

To support this conclusion, the trial court made Findings Nos. 10 and 11.

While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club of the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with re-

gard to membership, operation of cemetery (*sic*), the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.

The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma (Finding No. 10).

In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendancy was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal organization known as the "Puyallup Tribe" at this time (Finding No. 11).

(3) We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribes's termination.

Historically and uniformly the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation.⁴ And

4. For examples of such legislation see: Termination of the Klamath Tribe, 25 U.S.C.A. § 564; Termination of Wyandotte Tribe of Oklahoma, 25 U.S.C.A. §§ 791-807; Termination of the Peoria Tribe of Oklahoma, 25 U.S.C.A. §§ 821-826; Termination of the Ottawa Tribe of Oklahoma, 25 U.S.C.A. §§ 841-853; Termination of Menominee Tribe of Wisconsin, 25 U.S.C.A. §§ 891-902; and Termination of the Ponca Tribe of Nebraska, 25 U.S.C.A. §§ 971-980.

even the Supreme Court of the United States defers to the executive and other political departments of government "whose more special duty it is to determine such affairs" stating that "If by them those Indians are recognized as a tribe, this court must do the same." (*United States v. Sandoval*, 231 U.S. 28, 47, 58 L.Ed. 107, 114, 34 Sup. Ct. 1, 6 (1913)).

The trial court's "Memorandum Decision" is a very able and scholarly document, and while we have disagreed on this phase of the case, we are persuaded by its presentation that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination.

The trial court also found:

All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Finding No. 12)

The evidence supports this finding, and it is clear that though the Puyallup Tribe continues to exist, the entire reservation, except for the small tract to which reference was made, has passed into fee simple private ownership, consequent to congressional action, and that there is no longer a reservation.

Some questions having arisen concerning the power of the Indian allottees to convey complete fee simple title to their allotted lands, Congress confirmed the removal of the trust restrictions against alienation of the allotted lands. 33 Stat. 565 (1904).

Be it enacted by the Senate and House of Repre-

sentatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statute, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive evidence of congressional intent is shown by the House Committee's Report on this bill:

This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely as any other person may sell and convey real estate. (H.R. Rep. No. 301, 58th Con., 2d Sess. (1904))

Attached to the report, as an exhibit, was a letter from the Commissioner of Indian Affairs expressing the view that,

Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

There can be no question but that the legislation, as enacted, carried out the legislative intent.

Whether the land within the reservation remains in the possession of the original allottees, or whether it has passed into non-Indian hands, the result is the same, so far as the tribe is concerned: It has no legal interest in it. All of the land may be taxed by the state (except possibly the small tract reserved for cemetery purposes). *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295 (1905).

(4) While reservation lands are allotted and sold pursuant to an Act of Congress removing all restrictions upon alienation, there is no implied reservation of hunting and fishing rights. *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (1940), citing *Pennock v. Commissioners*, 103 U.S. 44, 48, 26 L.Ed. 367 (1881), and *Spalding v. Chandler*, 160 U.S. 394, 407, 40 L.Ed. 469, 16 Sup. Ct. 360 (1896).

The fishing rights of members of the Puyallup Tribe rest not upon any rights in the reservation lands, because these have been surrendered pursuant to the congressional action to which we have referred, but upon their "right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens of the Territory," derived from the Medicine Creek Treaty. We are well aware of the statement in *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. 662 (1905), quoted in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198, 63 L.Ed. 555, 558, 39 Sup. Ct. 203 (1919):

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong, over those to whom they owe care and protection,' and counterpoise the inequality 'by the superiour justice which looks only to the substance of the right without regard to technical rules.' 119 U.S. 1; 175 U.S. 1."

(5) We would protect these treaty rights as readily and effectively as they have been protected in *Winans*, *supra*, *Seufert Bros. Co.*, *supra*, and *United States v. Brookfield Fisheries*, 24 F. Supp. 712 (D.C. Ore. 1938), but such rights are not absolute; they do not extend to the right to fish with such gear and at such times as would destroy the fishery. The United States Supreme Court, in *Tulee v. Washington*, *supra*, said:

(T)he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it fore-

closes the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Consistent with this statement by the Supreme Court, this court and the Ninth Circuit Court of Appeals have passed on the regulations imposed by the Departments with an eye to determining whether the regulations concerning the manner and time of fishing then in question were necessary to the conservation of the fishery and, hence, could be enforced against Indians whose rights to fish at their usual and accustomed grounds and stations were preserved to them by treaties similar to the one before the court in the *Tulee* case.

McCauley v. Makah Indian Tribe, 128 F.2d 867, 870 (9th Cir. 1942), was tried in the district court before the decision in *Tulee* was handed down, but heard in the circuit court following that decision. The district court had entered a sweeping injunction against the enforcement of regulations interfering with the Makah Indians fishing in the Hoko River. The case was reversed with the closing comment.

The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the *Tulee* case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as "other Indian fishing gear," as they may be advised.

In *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951), again the Makah Indians sought an injunction against enforcement of certain regulations, and the district court dismissed the action; the Makahs appealed. The circuit court—citing the *Tulee* case, *supra*, and *Seufert Bros. Co. v. United States*, *supra*, and *United States v. Winans*, *supra*—summarily disposed of the contention which is also made here by the Departments, that

the Indians had no rights against state interference which do not exist for other citizens. It quoted with approval *Tulee, supra*, concerning such restrictions of a purely regulatory nature relative to the time and manner of fishing outside the reservation as are necessary for the conservation of fish and then said:

We are not here concerned, as we were in *McCaughey v. Makah Indian tribe*, 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are "necessary for the conservation of fish" in the fall run of salmon in that river.

The decision of the district court is reversed and that court ordered to make and enter an order restraining the appellee from enforcing such regulations.

In *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963), we upheld a 10-day closure of all fishing on the Skagit River, designed to protect the peak of the salmon run passing through that river to the spawning grounds,⁵ on the basis that the regulation was necessary to conserve chinook salmon runs in the Skagit River. In that case, McCoy, a member of the Swinomish Tribe, was arrested for fishing near the mouth of the north fork of the Skagit River. He was operating an 18-foot, 25-hp-outboard-motor boat and using a 600-foot modern nylon gill net. The superior court found that he was not fishing on the reservation, but was fishing at "usual and accustomed grounds" and acquitted him, holding that his rights under the Treaty of Point Elliott (12 Stat. 927; January 22,

5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinion in the *McCoy* case, *supra*, and Judge Finley's concurring opinion in *State v. Satiacum*, 50 Wn.2d 535, *et seq.*, 314 P.2d 400 *et seq.* (1957).

1855) gave him immunity to closure regulations. We reversed the judgment and sent the case back for a new trial, directing that the court determine whether the regulation violated was necessary to conserve the fishery.

We agree with the trial court that the rule of the *McCoy* case, *supra*, is the proper one to be applied where treaty rights and state conservation regulations are in apparent conflict. The burden of proof, once the defendant has established that he is a member of a tribe having a treaty right to take fish at all "usual and accustomed grounds and stations," is on the state to show that its regulations, which limit Indian fishing rights either as to the time or manner of fishing, are reasonable and necessary to conserve the fishery.

(6) The United States did not hesitate to adopt regulations it regarded as necessary to preserve the halibut fishery. The Makah Tribe sued to recover damages for alleged deprivation of the fishing rights reserved to them under article 4 of their 1855 treaty (12 Stat. 1939) with the United States. The Court of Claims held that the government's regulations restricting the rights of the Makahs to fish for halibut did not amount to a breach of the treaty. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477 (1959); affirmed 151 Ct. Cl. Rep. 701 (1960); *cert. denied* 365 U.S. 879, 6 L.Ed.2d 191, 81 Sup. Ct. 1028 (1961).

The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, *supra*, as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be "indispensable" to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at "usual and accustomed grounds and stations."

The word "indispensable" is taken from *Tulee v. Washington*, *supra*, where the Supreme Court of the United States struck down a requirement for a fishing license as applied to treaty Indians.

Viewing the treaty in this light, we are of the opinion that the state is without power to charge the

Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not *indispensable to the effectiveness of a state conservation program*. Even though this method may be both convenient, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. (*Italics ours.*)

It was the exaction of a fee for fishing which could not be reconciled with a fair construction of the treaty.

All would agree that the imposition of license fees is not indispensable to the effectiveness of a state conservation program, but such a holding is not supporting authority for the proposition that any regulation that the state adopts must be indispensable to the success of its conservation program before that regulation is applicable to treaty Indians. We are convinced that the Supreme Court did not set up such an impossible standard in *Tulee*, nor did it intend to. The real holding in that case is

(T)hat, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Tulee and other Supreme Court decisions recognize that the state must have the necessary power of appropriate regulation to preserve a resource for the benefit of all of the people of the state. *New York ex rel. Kennedy*

v. Becker, 241 U.S. 556, 60 L.Ed. 1166, 36 Sup. Ct. 705 (1916); *United States v. Winans*, *supra*.

We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.

It would make the competent exercise of the state's inherent power of preservation an impossibility. In *New York ex rel. Kennedy v. Becker*, *supra*, the United States Supreme Court discussed the reserved rights of the Seneca Indians to fish in the waters on land ceded by them to Robert Morris by the treaty of the "Big Tree" of September 15, 1797⁶ (7 Stat. 601). Mr. Justice Hughes, in an opinion adopted by the court after his resignation in 1916, said:

It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under

6. Ratified by the Senate on April 11, 1798, and proclaimed by the President.

modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." (pp. 563, 564)

Attention is particularly directed to the quotation from *United States v. Winans*, *supra*, at the end of the foregoing quotation.

In summary: We have rejected the Departments' argument that the Indian treaties are of no force and effect and that the state may repudiate them at will.

We have ruled that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe, and that the tribe continues to exist, at least so long as it is recognized as such

by the appropriate agencies of the United States, or until Congress passes a termination act.

We have agreed with the trial court that there is no longer a Puyallup Indian Reservation, and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation; however, we hold that they continue to have a right to fish at usual and accustomed grounds and stations and that any regulations of the Department, limiting or restricting those rights must be reasonable and necessary for the preservation of the fishery.

The state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.

We are, therefore, in accord with the conclusion of the trial court that an injunction should be entered in this case, however, the injunction entered by the trial court is much too broad. It permanently enjoins individual defendants and members of the federal organization known as the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington. It is predicated on the trial court's determination that the defendants have no treaty rights.

The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

The essence of this opinion is—and the decree, as framed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from

doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes; or a regulation or regulations promulgated thereunder; and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction.

The judgment and decree appealed from is set aside, and the cause is remanded for the purposes indicated in this opinion.

Neither the appellants nor the respondents having prevailed to the full extent of their claims, each will bear its own costs on this appeal.

FINLEY, C. J., WEAVER, and HAMILTON, J. J., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—I concur in the result reached in the majority opinion in so far as it holds that appellants in this case do have treaty rights and have standing to assert those rights in this suit, but I do not agree that the test of their right to fish is dependent on the existence or nonexistence of a state statute or regulation which has been held by the trial court to be reasonable and necessary for the conservation of fish.

I would reverse the trial court's degree of permanent injunction with directions to dismiss the action for any one or all of the three reasons stated below.

I.

I am of the opinion that:

- (1) The provisions of article 3 of the Treaty of Medicine Creek are presently the supreme law of the land and are superior to the exercise of the state's police power

respecting the regulation of fishing by Indians at places where the treaty is applicable.

(2) If the Secretary of the Interior and the Commissioner of Indian Affairs have adopted the proposed rules relating to off-reservation fishing by treaty Indians, the Federal Government has assumed control of the matters in controversy in this case, and state courts may not enjoin appellants from fishing in the Puyallup River. See 30 Fed. Reg. 8969.

(3) Assuming, arguendo, that the trial court had power to enjoin such fishing, the findings of fact do not support the conclusions of law or the permanent injunction entered by it. In my opinion, this statement is correct regardless of whether the "indispensable" test or the "reasonable and necessary" test be applied.

My views on the rights of treaty Indians to fish "at all usual and accustomed grounds and stations" are stated at some length in the first opinion (signed by four judges) in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), and in my dissenting opinion in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). See the decisions of the courts of last resort quoted and discussed therein.

In the interest of brevity, I incorporate those two opinions herein by reference as a part of this opinion. In those opinions, it was stated that, under the federal constitution, the treaty was the supreme law of the land and would continue to be until:

(1) the treaty is modified or abrogated by act of Congress, or

(2) the treaty is voluntarily abandoned by the Puyallup tribe, or

(3) the supreme court of the United States reverses or modifies our decision in this case. (at 529)

In the last 9 years since the two *Satiacum* decisions were filed none of these events have taken place. Nor have respondents sought a final solution of the problem through any branch of the United States Government—legislative, executive, or the Supreme Court.

II.

In the case at bar, the United States has for the first time appeared in this court and filed a brief as *amicus curiae*. Its counsel participated in the oral argument.

The United States contends in its brief that the trial court's permanent injunction fails to give *any* recognition to the rights secured to the Indians by article 3 of the Treaty of Medicine Creek. After citing cases relating to this contention, the government's brief states:

... It is enough at this point to note that the permanent injunction against fishing in the instant case, except in accordance with the regulations applicable to all, absolutely ignores the treaty-reserved rights of these Indians. Conclusion of Law IV, *supra*, is plainly contrary to *Tulee*. For this reason alone, the judgment and decree must be reversed.

It is further argued therein that the scope of the treaty-reserved rights of the Indians may best be determined by a federal authority. The reasons supporting this argument are stated as follows:

We must start with the established principle that interpretation of a treaty with an Indian tribe, like a treaty with a foreign nation, presents a federal question. *Worcester v. Georgia*, 6 Pet. 515 (1832). Had the Treaty itself, or Congress in contemporary or subsequent legislation, more specifically defined the right reserved or regulated how it was to be exercised (which would be another way of defining its scope), there would be no problem today. For, clearly, the federal statute would prevail, and no state law or regulation could impinge upon the Indians' exercise of the right as defined or regulated. See *Missouri v. Holland*, 252 U.S. 416 (1920), where the Supreme Court rejected the argument that implementing legislation pursuant to a treaty interfered with exercise of state regulatory provisions as to wildlife.

The brief then states that, pursuant to congressional action, the Secretary of the Interior and the Commissioner of Indian Affairs have proposed the adoption of certain

rules relating to off-reservation treaty fishing which have been published in 30 Fed. Reg. 8969. The proposed rules were signed by the Under Secretary of the Interior on July 5, 1965. Whether they have yet been officially adopted, we are not advised.

I mention the government's *amicus curiae* brief at some length because this is the first indication we have had of what the government's legal or administrative position is in regard to the status of the Treaty of Medicine Creek or to a departmental solution of the problems heretofore presented to this court concerning the off-reservation fishing rights of treaty Indians.

Thus, we now have official information that the legal representatives of the government take the position that an Indian treaty is the same as a treaty with a foreign nation. I presume that this means that an Indian treaty under the Supremacy Clause of the United States Constitution is the supreme law of the land. Cf. first opinion in *State v. Satiacum*, *supra*, and cases cited therein. We are also assured that the Interior Department is proposing to take some action regarding the regulation of off-reservation fishing by treaty Indians.

III.

I desire to point out that I disagree with the majority's discussion of the holding of the Court of Appeals in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), where that court said, at 172:

That, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed as "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead

fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up, and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food.

After discussing certain testimony presented by the Oregon officials, the Court of Appeals concluded:

However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty (*Tulee v. Washington, supra*), a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), *aff'd*, 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fish-

ing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The word "indispensable" is said by the majority not to be supported by the two cases cited by the Court of Appeals, to wit, *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 Sup. Ct. 862, and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). However, the United States Supreme Court denied the state of Oregon's petition for certiorari in the *Maison* case (375 U.S. 829, 11 L.Ed.2d 60, 84 Sup. Ct. 73).

While the denial of certiorari is not to be considered as an expression of approval of the lower court's decision, the *Maison* case involved the interpretation of a treaty which under the Supremacy Clause of the United States Constitution is the supreme law of the land, and hence could be authoritatively interpreted only by the United States Supreme Court. If the word "indispensable," in the context in which the court of appeals used it in the *Maison* case, substantially changed the meaning of the treaty as to the state's power of regulation of Indian fishing rights, one would suppose that, in view of the many conflicting decisions of various state and federal courts on this vital subject, the Supreme Court would have granted certiorari.⁷

The *Maison* decision was followed by Judge Solomon sitting in the United States District Court for the District of Oregon in *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, — F. Supp. — (decided August 8, 1966). This case involved the right of treaty Indians to hunt game. The language of the treaty involved was similar to the treaty in the case now before us. In upholding the Indians' right under the treaty to hunt game, Judge Solomon said:

In *Confederated Tribes of the Umatilla Indian Reservation v. Maison, et al.*, 186 F.Supp. 519, 520,

7. This is the second time that the United States Supreme Court has failed to grant a petition for certiorari which sought an authoritative ruling on the status of an Indian treaty with respect to state police power. See discussion of *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), found in *State v. Satiacum*, 50 Wn.2d at pages 525-529.

I construed this article to mean that the State may not restrict the off-reservation fishing rights, set forth in the treaty without showing that such restriction was necessary for conservation of the fish. The Court of Appeals in affirming this decision laid down the test to be applied to State-imposed restrictions of treaty rights:

"... while a restriction of the fishing activities of the plaintiffs must be *indispensable*, ... a restriction of the fishing activities of other citizens is valid if merely reasonable ...". (314 F.2d 169, 174 emphasis is original).

In other words, defendants here contend that in spite of the provisions of the treaty, the Indians have no greater rights to fish and hunt off their reservation than any other Oregon citizen. This contention was made and rejected in *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

No one disagrees with the defendants' argument that regulation of fish and game resources is necessary and desirable, and that an intolerable situation would arise if all citizens were permitted to fish or hunt without restriction. However, the issue here is whether a State is permitted to proscribe or limit the treaty rights of Indians without showing that such restriction is indispensable. *Confederated Tribes, supra*.

Until the Supreme Court holds that the term "indispensable" is not the correct test to be used in determining the validity of state laws and regulations vis-a-vis the fishing rights of treaty Indians, I think that this court should not read the word out of the *Maison* decision and substitute "reasonable and necessary" therefor.

Even if the rule approved by the majority decision in the case at bar is followed (i.e. that the state has the burden of proving that its regulations are reasonable and

necessary to conserve the fishery), I see no need for a further hearing.

The trial court stated in its memorandum decision that the total amount of salmon caught by Indians in the entire state in 1964 was only between 3 per cent and 5 per cent of the total number taken by Indians and non-Indians.

The trial court found the facts as to the fishing activities of appellants to be:

XIII. That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

XIV. The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

XV. The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

XVI. That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction of serious impairment of the anadromous fish runs of the Puyallup River.

XVII. That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.

XVIII. It is reasonable and necessary that state conservation, rules and regulations be uniformly ap-

plied to all citizens on an equal basis including the defendants.

The ultimate finding of fact is that the fishing activities of appellants, if not restrained, *could* result in the destruction or serious impairment of the anadromous fish runs on the Puyallup River.

The above quoted findings do not, in my opinion, support the conclusion that:

It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

Neither do they justify the entry of the trial court's judgment and decree which contained the following injunctive provision:

It is hereby Ordered, Adjudged, and Decreed That:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Game of the State of Washington.

I agree with the following statement made in the brief of the *amici curiae* Association on American Indian Affairs, Inc., as to the effect of the trial court's permanent injunction quoted above wherein it is said:

The decision below concerning the purported non-existence of the Puyallup Tribe today is novel, wholly contrary to well-established principles of Indian law, and completely at odds with sound public policy. In the first place, only Congress, and clearly not the State courts, has power to effect the termination of tribal status. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. McGowan*, 302 U.S. 535, 538 (1938); *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Sandoval*, 231 U.S. 28 (1913). Indeed, the rule that sole responsibility

for declaring when tribal existence has ended is vested in Congress has particular pertinence in this case where withdrawal of recognition from the Puyallup Tribe (at least in the view of the lower court) effectively would abrogate a solemn treaty commitment of the United States.

As indicated above, I likewise agree with the closing statement in the brief of the *amicus curiae* Association of Indian Affairs, Inc., which states:

The Superior Court's Findings of Fact and Conclusions of Law clearly fail to measure up to this standard. Neither the findings nor the memorandum deal with the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing or by other means not having an impact upon appellants. Similarly, the court below appears not to have considered whether preservation of the Puyallup River fishery, assuming the need for regulation, requires so severe a curtailment of Indian fishing as the respondents here seek to impose. Such disregard for the applicable law, particularly as enunciated by the United States Court of Appeals for this Circuit, cannot be allowed to stand.

In summary, unlike their non-Indian fellow-citizens, enrolled members of the Puyallup Tribe have a vested property right under the Treaty of Medicine Creek to fish at all usual and accustomed places outside their reservation. This off-reservation right to take fish, so essential to the Indians' very existence, is protected under Federal law, and, at the very least, may be limited by State law only under extraordinary circumstances. As a matter of law, the Washington conservation statutes and regulations may not be enforced against Indian treaty fishing rights in the same manner as they are against the bare fishing privileges of other persons. In the former situation, unlike the latter, the State of Washington has the burden of proving affirmatively that application to appellants of the attempted regulations is indispensable to the conservation of the fish resource

and the task of further proving that the desired conservation goals cannot be achieved in some other fashion. Respondents made no such showing in the lower court.

Unless it be held that Indian treaties are not treaties within the meaning of the Supremacy Clause of the United States Constitution and hence are not the supreme law of the land and do not override the police power of the states (contrary to the holding of the Supreme Court, cited below),⁸ I can only reach the conclusion that the judgment and decree of the trial court should be reversed with directions to dismiss the action.

I am further of the opinion that respondents have failed to prove either that the state laws and regulations here involved are *either* indispensable or reasonably necessary to the conservation of salmon fishery on the Puyallup River and hence would reverse and dismiss for that reason.

HUNTER, J. (dissenting)—I dissent. The ultimate holding of the majority is that the Puyallup Indians are subject to *regulations reasonable and necessary* for the preservation of the fishery. The majority's modification of the trial court's injunction when read with this holding is not consistent. The trial court properly applied our existing conservation laws to the Puyallup Indians by its injunction. The power of the state of Washington to regulate fishing for purposes of conservation has been clearly recognized as applying to the Indians *equally with others* by the United States Supreme Court in the case of *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941). In this case Justice Black for the court stated:

⁸8. See cases discussed in the first *Satiacum* opinion (50 Wn.2d at pages 516-519).

In *State v. Quigley*, 52 Wn.2d 234, 324 P.2d 827 (1958), a case in which a non-treaty Indian claimed the right to hunt deer on his own property without a hunting license, this court, in a unanimous en banc opinion concluded with this dictum: "Of course, a treaty takes precedence over a state law, but appellant has no treaty rights that restrict the state in its exercise of the police power. Our question, therefore, must be answered in the affirmative."

We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while *the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here. (*Italics mine.*)

Our present laws and regulations relating to the use of gear, and the time and place of taking fish are for no other purpose than the reasonable and necessary preservation of the fishery. These laws and regulations accomplish the purpose of the ultimate holding of the majority and therefore should have been imposed on the Indians *equally with others* as was done by the trial court.

In my opinion the ultimate holding of the majority is consistent with the injunction entered by the trial court, and there is no need for its modification.

ROSELLINI and HALE, JJ., concur with HUNTER, J.

HALE, J. (concurring in the dissent)—I agree with and have signed Judge Hunter's dissenting opinion. As a preface to further comment, it should be noted that this case has nothing to do with protecting or preserving for the Indians any rights in land or personal property or fostering their management of business or tribal affairs. It involves only the claims of a right to fish in places where all others are forbidden.

Appellants assert the right under a treaty to violate the laws of a sovereign state, laws designed to preserve, protect and develop a great natural resource that contributes vastly to the economic and recreational welfare of millions of its citizens. Appellants claim powers which, if exercised in full, will inevitably destroy this resource in the Puyallup River.

I find no language in the Treaty of Medicine Creek (10 Stat. 1132) concluded December 26, 1854, by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of the Territory of Washington, on behalf of the United

States and the "chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians,"⁹ warranting the conclusion that the Indians should be forever immune from the state's game and fishery laws. The most cogent language of the treaty, that particular phraseology designed to prevent unfair and invidious discrimination against the Indians and which vouchsafed to them the right to hunt and fish, granted these very rights *in common with all citizens of the territory*. See Treaty with Nisqualli, Puyallup, Etc., 1854, art. 3, 2 Indian Affairs, Laws and Treaties 496 (1902). As I would permit no discrimination against the descendants of the Puyallups, I would allow no discrimination in their favor either.

In my opinion, most of the decisional law written about Indian treaties, although intended to protect the American Indian in the rights to property and the pursuit of happiness has had a contrary effect. Decisions relating to Indian treaties begin with the hope of protecting the Indian, and inevitably end by treating the Indians as aborigines, and in doing so not only have tended to degrade the Indian and perpetuate the stigma of second-class citizenship earlier surrounding him but blinded this country to the need for legislation which will genuinely rehabilitate our Indian citizens and enable them to play a full and active role in the affairs of this state and country in common with all citizens of whatever racial origin.

The majority decision fosters an illusion that somehow by regarding the Treaty of 1854 as a device to confer upon shareholder members in appellant, The Puyallup Tribe, Inc., special privileges, immunities and emoluments not shared equally with descendants of the white settlers of 1854 or the citizenry at large, the courts are righting a wrong long suffered by the Indians.

But while intending otherwise, the opinion discriminates in favor of the Indians, granting to a few of them

9. 2 Indian Affairs, Laws and Treaties 495 (1902).

special favors, privileges and immunities not claimed or shared by other Indians, and perpetuating the idea that a treaty with the natives in 1854 is a viable compact with their remote descendants. In holding thus, the decision again delays the day when some descendants of the Puyallups will achieve full responsibility as citizens. I would put an end to such an invidious and discriminatory concept, and read the treaty as it was written.

Next, on the question of tribal existence, I think the evidence establishes and the learned trial judge rightly found that appellant, The Puyallup Tribe, Inc., never acquired nor now has any rights under the treaty. I believe that the tribe or band which signed the Treaty of Medicine Creek of 1854 has long since disappeared, its lands sold and descendants absorbed into the body politic and that the conclusion of the learned trial judge that

There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

is well supported by both the history of the tribe and the evidence in the case. This finding and the judgment should be affirmed.

**REMITTITUR FROM WASHINGTON STATE
SUPREME COURT TO PIERCE COUNTY
SUPERIOR COURT (Trial Court)**

Olympia

Dated March 15, 1967

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 12, 1967, became the final judgment of this court in the above entitled case on March 13, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

**AMENDED INJUNCTION OF PIERCE COUNTY
SUPERIOR COURT (Trial Court) IN
COMPLIANCE WITH REMITTITUR**

This matter having come on regular for hearing before this court upon the motion of plaintiffs and defendants to amend the permanent injunction heretofore entered by this court, the plaintiffs and defendants being represented by counsel, and the court being fully advised; now therefore,

IT is hereby ordered, adjudged, and decreed that:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

DONE IN OPEN COURT this 2nd day of June, 1967.
John D. Cochran, *Judge of the Superior Court*

**MEDICINE CREEK TREATY
(R.D. EX. A)**

FRANKLIN PIERCE
President of the United States of America

TO ALL AND SINGULAR TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-

four, by Isaac L. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klahche-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred

and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who

may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or

more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent Territory of Washington.

Qui-ee-metl,	his x mark. [L. S.]
Sno-ho-dumset,	his x mark. [L. S.]
Lesh-high,	his x mark. [L. S.]
Slip-o-elm,	his x mark. [L. S.]
Kwi-ats,	his x mark. [L. S.]
Stee-high,	his x mark. [L. S.]
Di-a-keh,	his x mark. [L. S.]
Hi-ten,	his x mark. [L. S.]
Squa-ta-hun,	his x mark. [L. S.]
Kahk-tse-min,	his x mark. [L. S.]
Sonan-o-yutl,	his x mark. [L. S.]
Kl-tehp,	his x mark. [L. S.]
Sahl-ko-min,	his x mark. [L. S.]
T'bet-ste-heh-bit,	his x mark. [L. S.]
Tcha-hoos-tan,	his x mark. [L. S.]
Ke-cha-hat,	his x mark. [L. S.]
Spee-peh,	his x mark. [L. S.]
Swe-yah-tum,	his x mark. [L. S.]
Chah-achsh,	his x mark. [L. S.]
Pich-kèhd,	his x mark. [L. S.]

S'klah-o-sum,
Sah-le-tatl,
See-lup,
E-la-kah-ka,
Slug-yeh,
Hi-nuk,
Ma-mo-nish,
Cheels,
Knutcanu,
Bats-ta-kobe,
Win-ne-ya,
Klo-out,
Se-uch-ka-nam,
Ske-mah-han,
Wuts-un-a-pum,
Quut-a-tadm,
Quut-a-heh-mtsn,
Yah-leh-chn,
To-lahl-kut,
Yul-lout,
See-ahts-oot-soot,
Ye-tahko,
We-po-it-ee,
Kah-sld,
La'h-hom-kan,
Pah-how-at-ish,
Swe-yehm,
Sah-hwill,
Se-kwaht,
Kah-hum-klt,
Yah-kwo-bah,
Wut-sah-le-wun,
Sah-ba-hat,
Tel-e-kish,
Swe-keh-nam,
Sit-oo-ah,
Ko-quel-a-cut,
Jack,
Keh-kise-be-lo,
Go-yeh-hn,
Sah-putsh,
William.

[illegible]

Executed in the presence of us:—

M. T. Simmons, *Indian Agent.*

James Doty, *Secretary of the Commission.*

C. H. Mason, *Secretary Washington Territory.*

W. A. Slaughter, *1st Lieut. 4th Infantry.*

James McAlister,

E. Giddings, Jr.

George Shazer,

Henry D. Cock,

S. S. Ford, Jr.

John W. McAlister,

Clovington Cushman,

Peter Anderson,

Samuel Klady,

W. H. Pullen,

P. O. Hough,

E. R. Tyerall,

George Gibbs,

Benj. F. Shaw, *Interpreter,*

Hazard Stevens.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

“In Executive Session, Senate of the United States,
“March 3, 1855.

“Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S’Homamish, Steth-chass, T’Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget’s

Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest:

ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

(L.S.) Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:

W. L. Marcy, *Secretary of State.*

EXECUTIVE ORDER OF 1873 PART III. EXECUTIVE ORDERS RELATING TO RESERVES.

Puyallup Reserve.

[Area, 1 square mile; occupied by Muckleshoot, Nisqualli, Puyallup, Skwawksnamish, Stailakoom and five other tribes; treaty December 22, 1854.]

(For Executive order of January 20, 1857, see "Nisqually Reserve.")

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, August 26, 1873

SIR: By the second article of the treaty concluded with the Nisqually and other Indians December 26, 1854 (Stat. at Large, vol. 10, p. 1132). "a square tract containing two sections, or 1,280 acres, lying on the south side of Com-

mencement Bay," was set apart as a reservation for said Indians, and is known as the Puyallup Reserve.

It appears from the records of this office that Governor Stevens, finding the Indians dissatisfied with the size and location of the reserve, as indicated by said treaty, agreed, at a conference held with them August, 1856, to a readjustment of said reservation, the exterior boundaries of which were surveyed and established by his order. This was done prior to the extension of the lines of the public surveys over the surrounding and adjacent lands. A map of the survey was transmitted by Governor Stevens to this office, under date of December 5, 1856, giving a description of the courses and distances of said exterior boundaries of the reserve, as taken from the field-notes of the survey on file in the office of superintendent Indian affairs, Washington Territory.

This reservation, as readjusted and indicated on said map, was set apart for these Indians by Executive order dated January 20, 1857. It was intended to have this reservation bounded on its western side by the waters of Commencement Bay, from the southeasterly extremity of said bay, around northwardly to the northwest corner of the reservation on the southerly shore of Admiralty Inlet. The survey was thought to be made so as to give to the Indians this frontage upon the bay, with free access to the waters thereof. More recent surveys, however, develop the fact that there is land along this shore, and outside the reservation, arising from an error of the surveyor in leaving the line of low-water mark, along the shore of said bay, and running a direct line to the place of beginning.

➤ In a report dated March 20 last, Superintendent Milroy calls attention to this inadvertence; and for the adjustment of the western boundary of said reservation, so that it may conform to the intentions of those agreeing to the same, as well as for the comfort and wants of the Indians, he recommends the following change, viz: Instead of the direct line to the place of beginning, to follow the shore line, at low-water mark, to the place of beginning.

Inasmuch as the lands proposed to be covered by this change are in part already covered by the grant to the Northern Pacific Railroad Company and by donation claims, I would respectfully recommend that the President be requested to make an order setting apart for the use of these Indians an addition to said Puyallup Reservation, as follows, viz: All that portion of section 34, township 21 north, range 3 east, in Washington Territory, not already included within the limits of the reservation. This would give them a mile of water frontage directly north of Puyallup River, and free access to the waters of Commencement Bay at that point.

Very respectfully, your obedient servant,

H. R. CLUM,
Acting Commissioner.

THE HON. SECRETARY OF THE INTERIOR.

WASHINGTON—QUILEUTE RESERVE.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., August 28, 1873.

SIR: I have the honor to transmit herewith a copy of a communication addressed to this Department on the 26th instant, by the Acting Commissioner of Indian Affairs, relative to the extension by Executive order of the reservation in Washington Territory known as the Puyallup Reservation, described as follows, to wit: All that portion of section 34, township 21 north, range 3 east, in Washington Territory, not already included within the limits of the reservation.

I agree with the Acting Commissioner in his views, and respectfully request that in accordance with his recommendation an Executive order be issued setting apart the tract of land described for the purpose indicated.

I have the honor to be, etc.,

W. H. SMITH, *Acting Secretary.*

THE PRESIDENT.

EXECUTIVE MANSION, *September 6, 1873.*

Agreeable to the recommendation of the Acting Secretary of the Interior, it is hereby ordered that the Puyallup Reservation in Washington Territory be so extended as to include within its limits all that portion of section 34, township 21 north, range 3 east, not already included within the reservation.

U. S. GRANT.

. . .

(R.S. 644)

J. E. LASATER'S TESTIMONY
(R.S. 644-649)

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you please state your name and address, sir?

"A. J. E. Lasater, 4410 Robbins Road, Olympia.

"THE WITNESS: L-a-s-a-t-e-r.

"THE COURT: Is that L-a-s-s-i-t-e-r?

"THE COURT: L-a-s-a-t-e-r.

"Q. What is your present occupation?

"A. I am Assistant Director of the Department of Fisheries.

"Q. And could you tell us what your educational background is?

LASATER, Direct

(R.S. 645)

"A. Yes, sir. I graduated from High School in Montana, and after a time in the service I attended the College of Fisheries, University of Washington; graduated in 1950 with a Bachelor of Science degree in Fisheries.

I pursued graduate studies for a little under a year, and then came to the Department of Fisheries.

"Q. And what have you done with the Department then since you came with them?

"A. Actually the, my experience in Fisheries goes back just a little bit further. While in High School I worked part-time in a fish hatchery in Montana,

and with the Department of Fisheries. I worked first testing the effect of the various pollutants on salmon, and on fish organisms, and salt water conversions.

I went from there into the, as project leader in the sports fishery section, then to the, Senior Biologist in charge of all Fish Management in the Department of Fisheries, and then to my present position.

"Q. I see. And are you authorized, Mr. Lasater, today to speak on behalf of the Director of the Department of Fisheries?

"A. I am so authorized.

"Q. Could you tell us what the Department of Fisheries' position is regarding the situation which has developed here on the Puyallup River? The Indian fishery?

LASATER, Direct

(R.S. 646)

"MR. CONE: Well, now, just a moment.

"Your Honor: I assume we are trying a lawsuit with questions of fact to be presented.

"Now, I assume from your statement, sir, that he is authorized to speak for the Director, then he becomes for our purposes the party opponent, perhaps, but I feel that, well, he can give an opinion; I question what relevance to these proceedings, sir, that the position of the Department of Fisheries, that is, certainly on that broad scope, what relevancy this might have to our lawsuit.

"MR. CONIFF: Oh, if your Honor please, you might recall at the end of yesterday's session Counsel very impressively made an offer of proof which I think might leave a misleading impression with this Court, and I, too, question the relevancy, I agree, but I do think that in all fairness we should be permitted to refute this inference.

"THE COURT: Well, I think, without trying to be funny, that as of today the Department opposes what is going on in the Puyallup River.

"Now, if you want to be that simple, that is about what it amounts to, isn't it?"

"MR. CONIFF: That is right.

"THE COURT: I am going to sustain the objection.
LASATER, Direct, Colloquy

(R.S. 647)

By Mr. Coniff:

"Q. Now, Mr. Lasater, are you familiar with the Indian fishery that has developed here in the Puyallup River?"

"A. I am.

"Q. And as a biologist, do you have an opinion regarding its effect on the fishery population of the Puyallup River system?"

"A. I do have an opinion.

"Q. Would you please state that opinion?"

"MR. MCLEOD: I object.

"MR. CONE: Your Honor, I will object until he lays a foundation for the opinion.

"THE COURT: Objection sustained. No proper foundation is laid.

"Q. Mr. Lasater, in connection with your duties which the Department—

"MR. MCLEOD: I am sorry, I can't hear you, Counsel.

"Q. Mr. Lasater, can you describe the Puyallup River in terms of salmon production?"

"A. Yes, I can.

"Q. Would you do so, please?"

"A. It is a good salmon producer, and I base this on being on the stream, on stream surveys, estimating spawning capacity, and on Department records of escapement, and in part upon the catch that has been made in the river in recent years.

"Q. Now, you have, I gather, visited the river itself on many occasions—

LASATER, Direct

(R.S. 648)

"A. Yes.

"Q. —Connection with your job with the Department? And do you have an opinion regarding the effect of the fishery which you have--have you observed the fishery there?

"A. I have.

"Q. Assuming, Mr. Lasater, that what is marked on Plaintiff's Exhibit No. 26 here, at the mouth of the Puyallup River, portrays a series of nets, assuming further that these nets are in operation seven days a week, and virtually constantly operating, remaining in this place, do you have an opinion regarding the effect of operation of just these nets at the mouth of the river in Commencement Bay upon anadromous fish stocks of the Puyallup River?

"A. Yes.

"MR. CONE: Your Honor, I will object on this basis: Counsel's question, hypothetical question, assumes that those nets are—I assume the phrase of almost constantly or practically constantly means twenty-four hours a day, 365 days per year, there is no evidence in this record to support that contention.

"MR. CONIFF: Your Honor, there is evidence in the record to support that part of the hypothetical, in that the testimony of many of the game protectors has been that every time they have patrolled this area during the past year or two, they have seen these nets, they have observed them, and that they

LASATER, Direct

(R.S. 649)

have observed them on week-ends, during the night and during the day.

"I think upon this we can say that for the purposes of this hypothetical at any rate that they are almost constantly in operation, which was the form of the hypothetical.

"THE COURT: I am going to overrule the objection, and I think Counsel has, can develop this on cross examination, and it may affect its weight.

"MR. MCLEOD: I would like to inquire of this

witness on *voir dire*, your Honor.

"THE COURT: In what respect?

"MR. MCLEOD: Concerning his competency to testify concerning this factor, and other factors.

"I don't believe there is any indication in his testimony so far that he is competent to testify concerning—

"MR. CONIFF: I believe the witness has testified he is a graduate of the University of Washington College of Fisheries, and has been working with the Department of Fisheries in various capacities since—

"THE COURT: I think it is something I would like to know as a preliminary, and I will allow Mr. McLeod to examine on *voir dire*.

LASATER, Direct Colloquy

(R.S. 876)

"REDIRECT EXAMINATION

By Mr. Coniff:

"Q. Mr. Lasater, one thing here on the last sheet of what has been admitted now as Exhibit M, there is listed mortality factors.

"When you gave your testimony regarding those, were those all the mortality factors, or were these only the actual cause factors that you considered?

"A. Mortality factors other than fishing, largely.

"Q. I see. I just wanted to clarify that.

"So perhaps to be accurate—

"MR. CONIFF: If I may mark your sheet?

"MR. CONE: Please do.

"MR. CONIFF: We can mark that on there.

"Q. So we will put it as Mortality Factors, Natural?

"A. Not entirely, natural. There is pollution in "c."

"Q. I see.

"A. Other than fishing.

"Q. So this would be mortality factors other than fishing. Am I correct in saying that these are just the ones you happen to recall now, so this may not be an exclusive list?

"A. It is not.

"Q. Now, Mr. Lasater, I believe on cross examination quite a bit of time was spent on the development of the theory or the fact that the regulations, or the fact that the Puget Sound fishery, both commercial and sports, take quite a percentage of

LASATER, Cross

(R.S. 877)

the total amount of stock produced by all of the various streams in Puget Sound.

"Now, what in your opinion would be the effect of attempting to regulate the Puget Sound commercial and sports fisheries solely on the basis of of any particular river stock, for example the Puyallup River stock, if this could be done?"

"A. If an entire fishery were, for instance, shut down in order to protect the Puyallup River stock, it would interfere with fisheries destined to all the other streams with which they are commingled. It wouldn't be practical.

"Q. I see. In other words, for instance the lower Puget Sound stock would be commingled, of other rivers, would be commingled with the Puyallup River stock at the time that commercial fishery is occurring in Puget Sound?"

"A. For instance, the silver salmon run is assessed in its general strength in Puget Sound, that is the rivers will react similarly in Puget Sound, in other words, if the silver run is up, well, in general, generally all streams will be up.

"Then as you get closer and closer to the river mouth, you can be more and more concerned with a particular river and enact regulations which will protect a particular stock as you approach that particular stream.

"Q. I see.

LASATER, Redirect

(R.S. 878)

"MR. CONIFF: Now, I might state to Counsel and to the Court that I haven't as yet received copies

of the Puyallup Fishing Regulations, so I am going to ask the witness to look at page 102 of the Hearing before the Subcommittee on Indian Affairs, the Committee on Interior and Insular Affairs, United States Senate, wherein is reproduced a copy of what purports to be a Fishing Regulation adopted by the Puyallups.

"Will there be any objection to the use of this document?"

"MR. CONE: No objection.

"MR. CONIFF: (Hands to witness.)

"THE COURT: What was the page?"

"MR. CONIFF: That would be page 102.

"THE WITNESS: 102.

"Q. Now, I would ask you, Mr. Lasater, as a biologist, to render an opinion as to whether or not this particular, this set of regulations, this particular regulation as it appears there, is biologically sound in light of a conservation interest, conservation interests or programs that you are attempting to maintain.

"Q. Would you go ahead and run through them, please?"

"A. There are ten points.

LASATER, Redirect

(R.S. 879)

"A. Actually, the paragraph before the first point states that, The Rules and Regulations cover the Puyallup River within the original boundaries and all usual and accustomed grounds on the ceded area of the 'Medicine Creek Treaty.' "

"I would believe that this would concern all of Puyallup watershed from the mouth to the very headwaters.

'1. One set net per Puyallup fisherman in operation.'

"It is difficult for me to comment on this because I don't know how many Puyallups there are, or what degree of blood is concerned, and so I can't have any idea how many over-all nets this might concern us with."

'2. One drift net per Puyallup fisherman in opera-

tion and all drift nets shall have right-of-way of the channel.'

"The same remark as per number 1, I don't know how many drift nets this would be.

'3. No set net closer than 600 feet apart, except at a natural eddy.'

"The definition of a natural eddy would have to be well understood. There are eddies all along a stream, so in our regulations we wouldn't be able to hold a distance between the nets based on a wording such as this.

'4. No set net to have more than 20 feet shore lines, combines net and line limit not to exceed 200 feet.'

LASATER, Cross

(R.S. 880)

"The 200-foot limit will easily encompass most of the river, and when we combine this with not knowing how many of these might be set, this could be a great amount of gear.

'5. Only a Puyallup Indian or the legal spouse of a Puyallup Indian may fish.'

"Now, I wouldn't know how many Indians this might encompass, based on blood line, or whatever. The next one.

'6. Length of drift net in the river shall not be more than 35 fathoms.'

"A little over two hundred feet. This will encompass most of the river. It could hardly be considered truly protective.

'7. Length of drift net on all salt water fishing shall not be more than 1,800 feet and said drift net shall not be closer to east shore of Commencement Bay than one-half of a mile.'

"The 1800 feet I believe approximates or is the same as our regulation on a drift net, but within the confined limits of the bay and with a set net fishery at the mouth of the bay, it must—I would conclude it must have something to do with interference of drift nets with set nets,

because there will be net gear fishing in the entire area.

'8. No Puyallup Indian can hire any outside fisher-
LASATER, Cross

(R.S. 881)

man to help him or run anyone's gear."

"That is not conservation. I wouldn't comment on it.

'9. Thirty-six hours of closure for conservations shall start at 6 p.m. Saturday and end at 6 a.m. on Monday.

"That is nowhere near a long enough time to allow a sufficient spawning escapement of fish up the Puyallup River with the lengths and types of gear and with what I would consider to be a large potential number of nets.

"Q. Mr. Lasater, would you consider the system of regulation—

"A. There is one more point.

"Q. Oh, excuse me. Please continue.

"A. Oh, the point is on a fee to the tribe. It has nothing to do with conservation.

(R.S. 882)

By Mr. Coniff:

"Q. Now, Mr. Lasater, you consider this system of regulation that you have just read there to be biologically sound, or unsound, in the light of your knowledge of the conservation needs of the Puyallup River system?

"A. It would be unsound, based on the river fisheries that I know of for salmon, which I know of.

"For example, the very large rivers, the Columbia, and the Fraser River system, which are very large rivers, and which have longer closures, and much more severe restrictions, are needed, even on a larger river.

"And our experience has been that a net fishery, such as this, on a small river is not amenable to control. You can't control the fishery well enough to insure the spawning stock in the Fraser River, which is a much larger river.

"The Salmon Commission has in their documents that the net fishery is capable of catching 98 per cent of the fish in the river.

"Q. That is on the Fraser River?

"A. And that is a very, very big river.

"Q. That is on the Fraser?

"A. Right.

"Q. Now, could you give us a comparison in size between the Fraser and the Puyallup, in terms of the water flow, or fish population, or something along this line?

LASATER, Redirect

(R.S. 883)

"A. Well, in both flow and population, it must be well over a hundred times the size of the Puyallup.

"Q. Now, Mr. Lasater, do you know of any fishery anywhere, either sports or commercial, which is not regulated?

"A. Salmon fishery or any fishery?

"Q. Excuse me, I should restrict the question to salmon fishery.

"A. None except for possibly some Indian fisheries.

"Q. Now, in your cross examination there was quite a bit of testimony regarding various catches of the various salmon species in the Puget Sound, and out in the ocean; is a catch or a catch record itself necessarily an indication of the total size of run of the particular specie, or stock of salmon?

"A. No. I believe we spoke of the 1960 silver run. The catch was very small that year, partly because there was a small run, but a very major factor was a complete closure over a long period of time, so that silvers would not be taken in the fishery and we would get our spawning escapement.

"Q. By the way, in connection with any of your answers, you may refer to the annual report, if you have one with you?

"A. (No response.)

"Q. Now, I believe on your cross examination you tes-

tified that the regulation of the upstream migrants or adult fish, as they began their migration to LASATER, Redirect

(R.S. 884)

the stream of origin from the ocean, I believe you said 'more significant' or 'more critical' or something along this line; is that correct?

"A. Yes.

"Q. Could you explain what you meant when you testified that this of such importance to you as Assistant Director of the Department of Fisheries, and as a biologist?

"A. As the fish come through the fishery, you assess the size of the run in the general area, then you take a look at the regulations that you already have in effect, and judge whether they are going to be sufficient to guarantee a spawning escapement to this stream in general.

"Then as the run approaches closer to the particular stream,—we have the Puget Sound divided into various fishing areas, and if the run to a particular stream, or group of similar streams and area, appears to be lower than the average that we have been looking at, then further restrictions will be placed in the particular areas which will affect those particular streams.

"So that as the fish approaches the stream our knowledge of the precise run to that stream gets better and better, and we can more intelligently and accurately regulate it, — regulate that particular run, as it splits off from the other runs.

"Q. Do you consider it important to have control over any fishing effort which is made upon the stocks at this point in their migration?

LASATER, Redirect

(R.S. 885)

"A. It is important if the stream is going to be held near or at its maximum potential production for endless years to come.

"Q. Now, as I recall yesterday, there was, you testified regarding the chum runs and the fact that they were on a general decline; is that correct?

"A. That is correct.

"Q. Now, I—

"A. I don't know whether they are declining further. They have declined, and they are at a low level.

"Q. Would you consider this—well, let me put it this way; are there natural variations in the total size of the runs for the various specie of salmon which we have here in the Sound area?

"A. There are extreme variations.

"Q. And upon what do you base this opinion, or—

"A. Well, first of all, we have actual records of fluctuations of the runs, but it occurs in this way: If you have a number of factors which can affect a salmon run, and they all work to the favorable side, then you will have a good run.

"If a number of them combined are all to the poor side, then you will have a poorer run. It is rather like a farmer when he plants his seeds; he is hopeful of a crop, but regardless of his best efforts, there is no guarantee that he will get a crop.

LASATER, Redirect

(R.S. 886)

"Q. So that you might say you are the farmer, then, in this situation, and you are attempting to act on the variable factors over which you do have control with regard to the needs, conservation needs of the resource.

"A. It is a rough approximation, except the farmer can see his crop any time, and ours is largely invisible, and on the move. It is quite a bit more difficult.

"Q. Now, have you, yourself, Mr. Lasater, ever made any test regarding the effect of discharge of effluents or wastes upon downstream migrants?

"A. Yes, I have.

"Q. Would you tell us about these tests and what conclusions you could draw from them?

"A. Over a period of years I have tested a number of potential wastes, or pollutions, on young salmon, and one of the remarkable features we found is at the downstream migration stage, they are migrating to the sea, and they are at their most resistant point to death or immobilization due to waste.

"Q. Now, what specie of salmon was this? Is this a Chinook?

"A. Chinooks, silvers, pinks and chums.

LASATER, Redirect

(R.S. 887)

"Q. I see. Now, did these tests, did you ever make any tests with regard to the discharge of any waste materials at the St. Regis Mill which is—I believe we have a map, sir, and we might be able to locate it.

"A. It is near the mouth of the Puyallup.

"MR. CONIFF: For the record, I would like to refer to this exhibit which has been admitted into evidence.

"Q. Could you point out to the Court on what has been admitted into evidence as Plaintiff's Exhibit No. 26 the location of this mill?

"A. Approximately, it is, or the mill is approximately there (indicating). I believe this is the mill.

"Q. Would you mark it on there, please, and initial it?

"A. (Witness complies with request of counsel)

"Q. And what conclusions did you draw from the tests which you conducted on the St. Regis affluents?

"A. That for one thing, that this particular pulp mill is, doesn't have as lethal waste as a number of others throughout the Puget Sound area.

"Q. Why is that, do you know?

"A. It is a type of waste, or it is—they burn, evaporate and burn their, what they call 'cooking liquor,' and recovery their chemicals, and there are a number of other pulp mills which dump their chemicals into the water.

"Q. I see. What conclusions do you draw from the tests which you made of the St. Regis affluents? And by the way, when did you make these tests?

LASTER, Redirect

(R.S. 888)

"A. Oh, these were in the early '50's.

"Q. What conclusions could you draw from them, if any?

"A. Well, we had drawn a precise conclusion as to the dilution that would, the waste that would kill young salmon. *I don't have them with me.*

"Q. Do you of your own knowledge know if St. Regis handles their wastes or their affluents in a manner prescribed by another state agency?

"A. There has been a considerable amount of work done with them by the Pollution Control Commission at the time that I was working, hauling wastes from the mill. They had a reputation of having what was described to be, as a very sloppy in-plant operation, meaning that there were large losses of various cooking chemicals and whatever. It has been brought to my attention that this in-plant operation has been considerably tightened up over the last—

"MR. CONE: I would object to that, Your Honor, 'it has been brought to my attention' unless this is within the scope of his official duties, that this might have been brought to his attention, that would be the rankest form of hearsay.

"THE COURT: Objection sustained.

"Q. One minor point that was brought out, I believe yesterday, Mr. Lasater, was that concerning, concerning the fact that the steelhead fishermen—I believe you testified that you as a fisherman used salmon eggs bait when you are attempting to fish for steelhead?

LASATER, Redirect

(R.S. 889)

"A. That is true.

"Q. Am I correct in summarizing your other testimony?

"A. (Nods head)

"Q. Where do these salmon eggs come from, if you know?

"A. They come from the commercial carcasses of salmon. They are not completely developed. They could not in any way be fertilized or used for, to produce fish.

"Q. In your opinion, Mr. Lasater, is the Indian fishery in the Commencement Bay and Puyallup area a significant cause for the decline of the salmon stocks of the Puyallup River system?

"A. Yes, it is a significant cause.

"Q. Over and above these other mortality factors?

"A. Yes.

"Q. Taking into account, now, these other mortality factors which you have outlined?

"A. Yes.

"MR. CONIFF: If I may have a moment, Your Honor. I intend to wind up the redirect examination very shortly.

"Q. I believe in your testimony earlier this morning, in response to a question by counsel, you indicated that in your opinion it was necessary to totally prohibit net fishery, of the Indian net fishery up to the town of Puyallup in the Puyallup River. Could you explain your answer a little further?

"A. Well, I wouldn't limit it to the town of Puyallup. The important factor is that the fish at the mouth of the river, and in Commencement Bay, at that point, whether they are numerous or few, are all

LASATER, Redirect

(R.S. 890)

that you have to work with to get your spawning stock up the river. And the fish do mill. They are very vulnerable, and if you don't control the fishery absolutely at this point, then all of your other efforts will have been completely in vain. And as the fish do mill, enclosures aren't effective, it has

been our finding in streams throughout the state of similar size, that we have had to shut the net fishery down completely. And the evidence of the effect of such a fishery can be found in the Annual Report records.

"Q. Could you refer to an exhibit number?

"A. (No response)

"MR. CONIFF: May I ask the Clerk to find out the exhibit number of the Washington Fisheries—

"A. It's the 1963 Annual Report.

"Q. 1963 Annual Report?

"A. (No response)

"MR. CONIFF: For the record, it is No. 32.

"Q. Isn't that right?

"A. (No response)

"MR. CONIFF: It is that which has been admitted into evidence as Plaintiff's Exhibit No. 32.

"A. I am referring to the catch of silver salmon by year on Page 166. There is a column on 'Inside Cape Flattery, total inside fishery,' I am going to refer to several cycle years specifically because we mentioned 1960 as being the lowest year on record. The year that produced that run was in 1957 when the total inside catch was 293,949 silver salmon. In

LASATER, Redirect

(R.S. 891)

1960, the catch was 103,787 silver salmon.

"Now, in that year, we had almost a complete closure, as I have mentioned, as soon as we could see what the run size was. So that from that low catch and low run there, in 1963 we were able to have a catch of 232,822, showing a recovery from this low point.

LASATER, Redirect

(R.S. 892)

"A. (Continuing) If we go to Page 197, the table at the lower right on the catch by the Puyallup Indians, we have a silver salmon catch in 1957 of

7,310; in 1960, our poorest year on record, the catch went up to 10,294. Largely as a direct result of shutting down all-over fisheries for escapement, the Indian catch increased. In 1963 then, total production was only slightly more than it was in 1960. The point is that regulations through the outside fishery on a very poor year has an effect of merely increasing the catch at the mouth of the Puyallup and not the escapement.

"Q. Now, just for clarification, you were using silver statistics, and silvers are a three-year fish, with very little overlap, is that correct?

"A. That is right.

"Q. So that the brood year figures would be pretty accurate, in your opinion?

"A. Yes.

"Q. So that the attempt to regulate other fisheries without regulation of a fishery in the estuaries of the sound, in your opinion, would this be impractical or—

"A. It can be totally ineffective.

"Q. Going back here on Defendant's Exhibit "M" for illustrative purposes, I believe that at this page (indicating) defense counsel wrote 'Except Sport Fishery;' was it your testimony that sport fishery was ineffective or inefficient in Commencement Bay?

"A. It is—

"MR. CONE: Objection; leading.

LASATER, Redirect

(R.S. 893)

"MR. CONIFF: I am merely asking if he recalled what his testimony was.

"THE COURT: Objection will be overruled.

"A. We found it not only here, but at river mouths throughout Puget Sound that the catch of fish as they mature and mill at the river mouth, sports catch, doesn't reflect the numbers.

"For instance, I can recall figures for Elliott

Bay where we had a very large run of Chinook Salmon this past fall, and the sport catch is a few thousand. I can't be precise, but it is a few thousand. The run to the hatchery alone approached 60,000 salmon. This is in the middle of a large city with an extremely heavy effort but a very low catch per fisherman on the peak of the run. The fish are there but they don't bite well.

"Q. So that would it be more accurate in your judgment to be 'Except a sport fishery' and then parenthesis 'relatively inefficient', or what would be appropriate language to put in there?

"A. Well, it says 'No mortality factor allowable except a sport fishery.' The statement is accurate but it would perhaps be more understandable for the Court if there was a sentence or statement that said that the sport fishery is inefficient at the mouth of the river. Now, inefficient in comparison, of course, to net gear or total numbers of fish arriving or in the vicinity of the gear.

"MR. CONIFF: No further questions.

LASATER, Redirect

(R.S. 894)

"RECROSS EXAMINATION

By Mr. Cone:

"Q. I wonder if I might ask you to hand me the 1963 Annual Report, sir.

"A. Can I have it back?

"Q. I am not going to walk off with it.

"A. (Witness hands to counsel) I am not sure what is in evidence or what isn't, and as soon as you fellows have it—

"Q. I promise you I won't even walk as far as the counsel table with it.

"You referred to the total Puyallup catch, and I believe you said it was on 197, is that correct?

"A. I don't remember the page.

"Q. Let me ask you this, sir, you have gone through the fishing regulations of the Puyallup River Tribe,

and do you recall what I am referring to now? I think you have the book up there.

"A. Yes, I have it here.

"Q. You said that portions of these regulations you weren't able to judge because you didn't know how many Puyallup River fishermen there were, is that correct I mean, Puyallup Indians fishing on the Puyallup River?

"A. That is right.

"Q. Now, you didn't mean to indicate, did you, sir, that the persons imposing these regulations or operating them would suffer from the same deficiency? Your observation?

LASATER, Recross

(R.S. 661)

"THE WITNESS: No.

"MR. McLEOD: Or under your control, these examinations, if any?

"THE WITNESS: Not direct supervision, no.

"MR. McLEOD: I have no further questions.

"THE COURT: Continue, Mr. Coniff.

"DIRECT EXAMINATIONS (Continued)

By Mr. Coniff:

"Q. Mr. Lasater, I believe you testified before voir dire that one time prior to becoming Assistant Director, you were responsible for the over-all what we might say, management program, in a biological sense, for the Department.

"Would you describe to the Court a little more in detail what were your duties when you were in that capacity?

"A. My duties in general were to be aware of and make recommendations concerning all fisheries, where fish were physically removed from the resource for human consumption, or animal food, or otherwise, either for sport or commercial, and this would include any of the ocean fisheries, Puget Sound Fisheries, or any river fisheries.

"And it was my duty to analyze these fisheries and make recommendations for management of the stocks.

"Q. Well, now, am I correct in assuming, then, that LASATER, Direct Voir Dire

(R.S. 662)

the—well what type of recommendations would you make for a given run of fish, we will say, that was coming in, and was—how do you determine the size of the run when they commence to come into the Puget Sound area, or return there from a stream of water?

"A. This is going to take a little while. It is quite complicated.

"Q. Take your time.

"A. These—the fishery, of course, varies by the specie. Dr. Donaldson went into quite a bit of, quite a few statements concerning the various species. But the fishery begins on, at least some of the species, on the high seas.

"And the Department of Fisheries does not conduct many tests on the high seas, but the Federal government does. The Fisheries Research Institute of the University of Washington does.

"We have access to Japanese and Russian data. And the first concern is with, of course, with the high seas fishery. It is apparent from the tagging studies fairly immediately that the Japanese high seas salmon fishery was, or has virtually no effect on Washington stocks, since the fish tags in the area of the Japanese fishery were almost never recovered in a Washington stream.

"The Russians don't fish salmon on the high seas.

LASATER, Direct

(R.S. 663)

"By the way, they concur with the United States and Canada that this shouldn't take place. I am referring to high seas fisheries with nets.

"The Japanese fishery takes place far enough

west so that they are not operating on basic Washington stocks.

"So that the Chinook and silver salmon will first appear in the troll fishery and in the sport fishery.

"Q. This is offshore, now, or out of the Sound? We are not fishing—

"A. We are inside fishing, and out of the Sound, both. It is both inside and outside the three-mile limit.

"But west of Capa [sic] Flattery is where they first appear. And most fisheries are limited by season, and by year, and the sport fishery by a bay limit.

"And both fisheries are regulated by size, limits, to protect immature fish.

"The pink salmon, and the sockeye salmon are taken in relatively small numbers by the hook and line fisheries; chum salmon but rarely.

"Q. Why is this, just as a footnote here?

"A. The simplest answer is that they don't bite.

"Q. I see.

"A. This may be changed as—their manner of feeding is such that they eat much smaller organisms than the Chinook and silver salmon do, and don't take the things that are offered to fish.

LASATER, Direct

¹ (R.S. 664)

"Q. Would you continue now with your explanation of the biological considerations that, or the regulation patterns and biological considerations leading to the regulation of the fishery on these?

"A. One more factor on the high seas is that not fishing is illegal in both the United States and Canada by international agreement, and the reason for this is that the principle is clearly established that—

"MR. CONE: Your Honor, I am going to object to his testimony as to the reason behind any official international compact between this country and the Canadians, unless he lays a foundation that he drafted the document, or participated in the drafting of it.

"MR. CONIFF: Your Honor,—

"THE COURT: Objection overruled."

By Mr. Coniff:

"Q. You may continue.

"A. I am familiar with the documents in Washington as well as the other states.

"There is no net fishing on the high seas based on the principle that these are what we would call milling stocks. And with a milling stock that is not migrating to a given point over a given period of time, management becomes very, very difficult, because a week-end closure, or a weekly closure, or some such thing, doesn't work because the fish are continuously available to the fishery.

LASATER, Direct

(R.S. 665)

"In other words, to fish one week, and then close a week, the fish has not escaped the fishery. They are still there when you fish again, and it is simply a matter of getting enough gear out there. The run can be, or the stock can be badly depleted without control, so there is no net fishery as the fish entered the Straits of Juan de Fuca.

"They are migrating, and in late summer—well, part of the stock is sockeye. The sockeye has mostly started in early summer. And various species migrate at various times during the summer, and into the fall.

"But then we have fish that are traveling, going directly to the river mouth, and net fisheries do take place.

"The troll fishery does not come inside. The sport fisheries do continue, and there the gear is regulated by length, and by area that they may fish, and by closures which are put in ahead of the season based upon what knowledge we have, or what expectations we have of the coming run.

"And then there are emergency closures involved in many years because the run, or the fishery developed differently than we thought, and these are imposed for additional protection on the stocks; here, the week-end closures.

"Actually, this is, oh, just a way of speaking, sometimes a fishery may fish one day a week, or two

LASATER, Direct

(R.S. 666)

days a week, on a poor run, but the closures are such on the moving stock that fish do escape the fishery, and move on through on the closures, so that we have both harvest and escapement.

"The fish proceed down Sound through various fishing areas. They are set up in areas so as the fish begin to move to different rivers, their strength of the run, the strength of the runs can be independently assessed, and special closures put in special areas.

"For instance, if Area A has a good run and Area B has a poor run, Area A will have a heavier closure, or more restriction, or perhaps total closure, while the area of the more abundant run is left open as the fish come on through these areas.

"With the various closures, and with the rather constant surveillance of the fishery, lots of emphasis is placed on how many boats are fishing, and what is their catch per landing.

"In other words, the catch per unit of effort.

"If there are, for instance, a lot of boats fishing, and the catch per unit of effort is very low, this tips us off that the run is weak compared with past records, and we may take action.

"If the run is strong, we may take further action

LASATER, Direct

(R.S. 667)

to liberalize the fishing.

"As the fish approach the river mouth they once again slow down, and they will mill at the river mouth, so very nearly every river in the State of Washington has a salmon preserve at its mouth.

"Commencement Bay does, Elliott Bay, and a number of streams.

"The salmon are milling and delaying, and es-

pecially in times of low water or early arrival of the run or for any number of reasons, the delay may be considerable.

"Once again the fish are available to the net again and again. This is the main reason for the preserve, so that the milling stock will not be completely taken.

"Them [sic] further, this is a point in the bay at the river mouth where you very definitely have a funnelling effect. The entire run is funneled into a smaller area and it is very vulnerable.

"A limited amount of effort right at the river mouth may take a considerable segment of a run.

"Q. Now, Mr. Lasater, what do you consider to be the necessary or proper environment, fresh water environment, for the production of salmon?

"A. They should have free access, or a free area of movement in the river. They should have copious quantities of gravel, without a great deal or what I call fines [sic], mud and sand.

LASATER, Direct

(R.S. 668)

"The water temperatures should be cool, and for many species it is important that summer temperatures be low and river flows relatively high, plenty of water through the summer months.

"Q. Would you consider the Puyallup River system to meet these requirements, or these environmental requirements?

"A. The Puyallup River is a fine salmon stream. The Puyallup River and its tributaries are good salmon producers, good environmental habitat.

"Q. Now, Mr. Lasater, I ask you to assume that there is a complex of gear, fishing gear, roughly to size, as portrayed on plaintiff's Exhibit No. 26, and I ask you to assume that this gear is in almost continuous operation at the mouth of the Puyallup River where it comes into Commencement Bay, and I would ask you further to assume that this gear is made up of not only gill nets but mono-

filiament nets. I ask you further to assume that this gear is in operation seven days a week, twenty-four hours a day, during the peek of the runs of the various species of fish which inhabit the Puyallup River system, and I ask you to further assume that further upstream above the net complex portrayed on plaintiff's Exhibit No. 26 that there are a series of set nets of varying lengths and varying construction, draped and set up on the sides of the banks, or set from various bridges which cross

LASATER, Direct

(R.S. 669)

the river above the mouth of the stream, the river; I ask you to further assume that during certain portions of each week a drift net fishery is in operation, and that this drift net fishery is operated in such a manner as to virtually block or sweep the river of all fish.

"Now I would ask you, do you have an opinion regarding the effect of such a fishery upon the salmon stock of the Puyallup River system? A yes or no answer.

"MR. CONE: Just a minute.

"Your Honor: especially with such an elaborate hypothetical, I am loath to object, but, number one, he is asking the Doctor to assume the complex of nets is—and I hope I am quoting it correctly—of the size indicated on the map.

"Now, every witness who has gone there has said no, no, this is not to scale, because that indicates single nets 900 yards long.

"Now, number two, he is talking about monofilament, and there is not in evidence at this point any evidence that that fishery, specifically the complex that he is indicating, contains any monofilament.

"Now, there are other things there which are not in evidence in the hypothetical, but, respectfully, I think we should use that for starters.

LASATER, Direct

(R.S. 670)

"MR. CONIFF: Well, your Honor, I could take it point by point if you so desire.

"THE COURT: Well, I think the point is well taken, based upon the fact that the diagrams as made by the witness on the map are certainly not to scale, and I do think that you have added some points here that are not sustained by the evidence yet, at least.

"For example, your use of the word of virtually sweeping the rivers free of fish. I don't find any evidence to that effect; yet, anyway.

"I am going to allow you to reconstruct your hypothetical question, and I am going to take a recess at this time.

"I would like to ask Counsel to meet me in Chambers, please.

LASATER, Direct

(R.S. 671)

—By Mr. Coniff (Direct Examination Cont'd)

"Q. Mr. Lasater, before we try to develop your opinion on the effect of the fishery, if any, in the Puyallup River, I would like to take a couple of steps back over some of the points you raised in your other testimony, particularly on the voir dire examination. To your knowledge—well, how does the, or how do you as a biologist, or how does the Department of Fisheries take into account in their setting the regulations and so on the effects on the mortality, mortalities from all causes, on the fish population, of fish stocks under your jurisdiction, salmon in this case?

"A. The problem of mortalities—I think that if you would remember back to Dr. Donaldson's testimony, that he pointed out that basically for every two fish that spawn, you need two back, and there is a variation of mortalities in between. And the basic thing is if the mortality rate from any number of causes is affecting your stock, whether it be straightening of the river channel, or pollution, or

bad logging practices, or whatever, this will, can be expected to increase the mortality rate on the fish prior to them coming back to the spawning stream, and perhaps after they return.

"And allowing for this, you assure that the spawning escapement gets to the spawning grounds. In fact, if you have to allow for these allowances, you have to take it out of the heart because if you don't, then you not only have detrimental environmental factors operating, you also have even less fish, because you have not filled

LASATER, Direct by Coniff

(R.S. 672)

the spawning grounds. You are working two important things at the same time if you do otherwise.

"Q. In other words, these other mortality factors in the total life cycle of our fish stocks, and salmon stocks, are adjusted, so to speak, by the setting of the, by the regulations concerning the harvest of these fish?

"A. Two things; you try to correct the cause, and if you can't correct the cause, then you allow for its effect.

"MR. MCLEOD: What was that last statement?

"THE WITNESS: If you do two things in the mortality problems, you try to correct the cause.

"MR. MCLEOD: Yes, but what was that last statement that you made?

"THE WITNESS: If you can't correct the cause, then you must allow for its effect.

"Q. Now, directing you attention to the Commencement Bay area, and the Puyallup River, I believe there has been testimony that there is an area that is closed to commercial fishing; what about sports fishing for salmon?

"A. Sports fishing is allowed in the bay.

"One thing that has become quite well known with the sports fishery, and that is, especially after the fish have finished their migration through the sound and they are milling near the river mouth

and maturing, they cease feeding and they don't strike very well, so the hook and line fishery will take but a small percentage of the available stock no matter how hard they fish.

LASATER—Direct by Conniff

(R.S. 673)

"And the river itself, we had a sports fishery on the river in past years, limited in area, and then further limited in time, and then as our dissatisfaction with spawning escapements increased, at our last regulation hearing we closed the Puyallup River to all sports fishery for salmon, except for what we call 'jacks.' And the jacks are the precocious males that contribute very little to the spawning ground. There are no female jacks, and they can be differentiated by size since they are much longer than the other fish.

"Q. Perhaps you should explain at this point, what is a jack salmon, and whether it is a two-year fish, three-year fish, or what?

"A. It depends on the specie. 'Jack' can refer to any specie. It is a salmon that matures a year prior to normal. For instance, fall Chinook normally mature as two, three and four-year-old fish. The jacks mature as two-year-old fish, and they are almost 100 per cent males. So they are small males because they are younger.

"A silver salmon matures almost entirely at three years of age. Jack silvers are two years of age. And these jack silvers are usually around, oh, twelve to eighteen inches long, maximum weight probably four and a half pounds, where the three-year-old fish largely run from five to twenty pounds.

"Q. Now, we will make another try at the hypothetical
LASATER—Direct by Conniff

(R.S. 674)

question. Mr. Lasater, have you—first, have you observed a complex of nets operated by Indians at, in or about the mouth of the Puyallup River?

"A. I have observed the nets.

"Q. When did you observe them?

"A. In the fall of 1963 when I flew over the bay.

"Q. And about—could you describe these nets to the Court as to what you observed, and then how long they were?

"A. They were, when I flew over the bay, there were a great many nets in the bay. I was flying at an altitude of approximately two to three hundred feet, and the nets, the longer nets looked to be, oh, to me, a thousand feet long. Some of them were—it's hard to tell one net from another net when they are attached together because there are various wings, and other nets attached at angles to the main net.

"The thing that impressed me was that they quite well encompassed the mouth of the Puyallup River.

"Q. Do you mean they went all the way across the mouth?

"A. I couldn't see if the nets were completely across the mouth. The nets were clustered about the mouth of the river, and in such a way that I would expect any fish entering the mouth of the Puyallup would have plenty of opportunity to contact these nets.

"Q. Now, would you assume, Mr. Lasater, that these nets that you saw at the mouth of the river are in operation during the times that the various anadromous fish stocks are returning to their spawning grounds in the Puyallup system, and that this

LASATER, Direct by Coniff

(R.S. 675)

net complex, these nets are left in position capable of, left in this position and in operable condition for twenty-four hours a day during this time?

"A. I based my answer on talking to numerous members of our staff who have observed the nets from time to time, and it is my understanding from the record given here, and talking to our staff, that

nets, such as the group at the mouth of the river, are seldom removed, that they are there most of the time.

"MR. CONE: Your Honor, I move that—wait just a minute. I will move to strike this understanding based upon various hearsay conduits, and what his understanding of the 'record' given here.

"Now, he can answer the question based upon his personal knowledge of the hypothetical state of facts, or the data of which he has personal knowledge, but I think that any attempt to instruct an understanding with the record made this far here, other than of the various reports, would be inadmissible.

"THE COURT: The voluntary statement will be stricken. Just wait, Mr. Lasater, until the hypothetical question has been completed, if you will, please.

"Q. Now, Mr. Lasater, would you assume that the nets which you observed were, are in operation twenty-four hours a day, during the times when the various stocks of fish are arriving at the mouth of the river on their way to the spawning grounds; would you further assume Mr. Lasater, that there are

LASATER, Direct by Coniff

(R.S. 676)

at various other locations along the banks of the river other set nets of varying lengths of, say, of varying lengths from 30 to 40 feet long, and varying in numbers, in terms of locations of ten to twenty; now assuming this set of facts, Mr. Lasater, do you have an opinion as to the effect of such a fishery upon the anadromous fish population of the Puyallup River?

"A. Yes.

"THE WITNESS: Your Honor, may I say something?

"THE COURT: You just said 'yes.' Now that is the first answer.

"THE WITNESS: I am not trying to answer, when he said 'would you assume,' and I answered before, I thought I had a question and not a hypothetical.

"Q. Go ahead.

"MR. McLEOD: I would like to object for, to this witness's answer on the basis that, he hasn't shown any qualifications to answer this particular question, because he hasn't personally observed the facts of the data that he is testifying on. He hasn't considered all of the factors involved."

"He said that his hypothetical question, and the answer to it, or he said yes, but by his own statement he has not made sufficient tests, or sufficient personal observations to place it within his own knowledge, the factors upon which he is going to testify, and the factors involved in the expert opinion he is going to express."

LASATER, Direct by Coniff

(R.S. 677)

"And I also would like to object on the further ground that the hypothetical question is inadmissible in a sense that it isn't, it doesn't properly describe the evidence that is in the record."

"THE COURT: Objection will be overruled. The answer is yes, he has an opinion. You may continue."

"Q. What is that opinion?"

"A. (No response.)"

"Q. Would you tell us what it is?"

"A. Well, it will take some explanation. I would like to make, to bring some background into it in that there is a wide basis of written statements on the effect of unregulated fishing on a number of fisheries."

"MR. McLEOD: I will object to this answer as being non-responsive, and I will move that it be stricken."

"THE COURT: Objection will be overruled. I think he is entitled to give his reasons for, and background of the opinion."

"MR. McLEOD: Well, I would like to move to strike the answer on the basis of it being from hearsay data and not within his personal knowledge, nor not within his personal supervision or control."

"THE COURT: Objection will be overruled. I take

it he is testifying as an expert based upon study and experience both.

"A. I would, a point of my study would refer to the F.A.O. document of the United Nations conference LASATER, Direct by Coniff

(R.S. 678)

called a 'World Conference' on the effect of regulation on economics, fishing regulation on economics.

"There, aside from the strictly biological problem we have, are the, and the occasional point, is the general principle that an unregulated fishery will do either or both of two things; ~~that it will~~ expand to the point that the stock is depleted, then the fishery will drop off to a point where it barely exists at sufficient strength to hold the stock of fish at a low level.

"The other effect is that yearly it will multiply the number of fishermen, or the number of net efforts will multiply to the point where the catch is divided among so many individuals that very little profit is made by anyone, then the fishery will then fall off.

"As regards to the Puyallup River itself, this and other readings and other studies would lead me to believe that efforts alone, increased efforts alone for a time will hold the catch at a fairly high level, while the escapement will decline; then the stocks will subsequently decline, and then the catch must fall off. And I would expect that the unregulated fishery would then remain at a low level until some major factor changed.

LASATER, Direct by Coniff

(R.S. 679)

"MR. MCLEOD: If you Honor please, I would like to move to strike all this witness's testimony as an expert on this subject on the grounds previously stated.

"THE COURT: Motion will be denied.

By Mr. Coniff:

"Q. Now, Mr. Lasater, I believe you mentioned in your answer that the escapement had been declining, is that correct?

"A. Yes.

"MR. MCLEOD: I will object to this question and move the answer be stricken.

"Counsel is obviously leading the witness and telling him what to say.

"THE COURT: I will sustain the objection to the form of the question in this instance.

"Q. Have you with you, Mr. Lasater, any data which would reflect the escapement of anadromous fish over the past few years into the Puyallup River system?

"A. Yes, I have.

"Q. May I have it, please?

"A. I would refer to a record of our hatchery count, and to the Annual Report.

"Q. And is the page marked here (indicating)?

"A. That is a different page.

"Q. Would you mark the page then?

"A. All right.

"Q. Which has these figures?

"A. (Witness complies.)

LASATER, Direct

(R.S. 680)

"Q. Mr. Coniff, on marking the page with a marker—

"MR. MCLEOD: What are you looking at?

"THE WITNESS: I am looking at the year 1963, 73rd Annual Report of the Washington Department of Fisheries.

"MR. MCLEOD: Could we have a copy of it, please, to look at?

"MR. KNODEL: We have a copy, your Honor.

"MR. MCLEOD: You have an extra copy to look at?

"MR. KNODEL: (Hands to Counsel.)

"MR. CONIFF: If I may have a moment, you Honor,

we will try to provide Counsel with additional copies of this data.

"Now, I would like to have this marked for identification, if I may.

(Whereupon, Plaintiff's Exhibit Number 31 was marked for identification.)

By Mr. Coniff:

"Q. I am now handing you what has been marked for identification as Plaintiff's Exhibit No. 31, and I will ask you to tell the Court what that is.

"A. May I have another marker for this page?

"Q. (Counsel hands to witness.)

"A. This is a record of the total adult salmon arriving at the Puyallup hatchery with a segregation of those spawned artificially and those permitted to spawn naturally, but it is a record of the run arriving to the Puyallup hatchery.

LASATER, Direct

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"Q. I see. And looking at what has been admitted into evidence as Plaintiff's Exhibit No. 14, would you please point out to the Court where that hatchery is located on this illustrative map?

"A. (Witness leaves witness stand.)

"The hatchery is here above Orting on the tributary of the Carbon on Voits Creek (indicating).

(Witness resumes witness stand.)

"Q. Now, is this data a part of the—well, you might call it official or regularly kept statistics or records of the Department?

"A. Yes, it is.

"Q. This is a copy made from these statistics of the Department?

"A. Yes.

"MR. CONIFF: I would like to now move for the introduction of what has been marked for identification as Plaintiff's Exhibit Number 31.

"MR. MCLEOD: What is the materiality of this?

"MR. CONIFF: This is to show the declining es-

capement of the anadromous fish, in so far as the hatchery operation is concerned, the Puyallup River.

"It certainly has a major bearing on the over-all conservation issues in this lawsuit.

"MR. MCLEOD: These are the same ones that are LASATER, Direct

(R.S. 682)

published in your—

"THE WITNESS: This a more detailed breakdown than you will find in this volume (indicating).

"MR. MCLEOD: Are you putting them both in?

"MR. CONIFF: Yes, I was intending to have marked for identification and offered into evidence the particular page of the 73rd Annual Report of the Department of Fisheries which would show the total escapement of all fish, anadromous fish, into the Puyallup system.

"MR. MCLEOD: What page is this particular data on?

"THE WITNESS: I was going to use several pages.

"On page 102 is escapement, adult escapement to hatchery racks, silver salmon; and there is a table of this on page 102. Chinook salmon, the same thing on page 100.

"Then chum salmon, same record, page 104.

"Further, I intended to refer to the catch of salmon by the Muckleshoot Indians on the Reservation, that reservation as marked on the White River (indicating), as an index to fish coming up that stream, which is on page 197, and the counts of salmon hauled above Mud Mountain Dam, which is also on the White River and is marked on that chart (indicating).

"Q. Would you give us the page number on the Mud Mountain Dam—

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(R.S. 683)

"A. That is 210.

"MR. CONIFF: If I may have this document, then I will have it marked for identification.

(Whereupon, Plaintiff's Exhibit Number 32 was marked for identification.)

"MR. CONE: No objection, your Honor.

"MR. CONIFF: I move the admission, then of what has been marked for identification as Plaintiff's Exhibit Number 32, and the particular pages which the witness referred to.

"MR. CONE: No objection.

"MR. McLEOD: No objection.

"THE COURT: It will be admitted as Plaintiff's No. 32.

(Whereupon, Plaintiff's Exhibit No. 32 for identification was admitted in evidence.)

"Q. Now, Mr. Lasater, is this data which you have referred to now and identified of any significance to you as a biologist?

"A. Yes, it is.

"Q. Would you explain of what significance this data is?

"A. In at least two ways: one, based on experience at other hatcheries on Puget Sound with these stocks, it was our expectation to be able to increase the run of salmon to the Puyallup River through operations of this hatchery, and it has not lived up

LASATER, Direct

(R.S. 684)

to its expectations in this regard.

"Further, the record of salmon arriving back at the hatchery is an index to the escapement to the Puyallup River of these species.

"Q. I see. Is there any trend established that you can tell from these figures that in your opinion as a biologist would be significant?

"A. Yes. The total run to the rack built up for a time, and then went into a rather extensive and serious decline.

"Q. About when did this occur, begin to occur?

"A. Runs vary, of course, but in 1952, for instance, a total of 6,739 salmon arrived at the rack; '53, 4,900

approximately, '54, 4,700; '55, 2,600; 1956, 3,300; 1957, 2,400; 1958, 1,200; 1959, 2,100; 1960, 1,400; 1961, 1,200; 1962, 947; 1963, 733; 1964, a considerable rise, with 7,000.

"Q. How would you explain the rise in 1964, or can you?

"A. This fishing at the mouth of the river and in the lower river was considerably curtailed in 1964.

"Q. Now, if you refer to the annual report that has been admitted in evidence as Plaintiff's Exhibit Number 32, will you explain to the Court the significance, if any, of the data on the pages you mentioned in your identification of this document?

"A. The pages on hatchery escapements of the various species is a breakdown of the totals that I men-

LASATER, Direct

(R.S. 685)

tioned here (indicating), and, therefore, these two are complementary, and I would let that go if that is—

"Q. Fine.

"A. On page 197 the take by the Muckleshoot Indians on the White River in the 1940's varied between two and three thousand fish; reached an exceptional high in 1949, I believe, of nearly 20,000; then dropped back to the two to four thousand level, and then down to—I will go through some figures:

"1958, 1,800; 1959, 1,600—

"MR. McLEOD: Just a second.

"Are you reading that from the report?

"THE WITNESS: I am on page—

"MR. McLEOD: That is the best evidence of this.

"MR. CONIFF: For purposes of explaining, I would presume he could read from the document.

"THE COURT: Well, I think it would be helpful to me in any event, so I will overrule the objection.

By Mr. Coniff:

"Q. You may continue.

"A. (Continuing) 1960, 1,700; 1961, 3,800; 1962, 2,300; 1963, 724.

"Now, this must be tied to the Mud Mountain Dam escapements, since the fish that go by the Muckleshoot Reservation are hauled around Mud

LASATER, Direct

(R.S. 686)

Mountain Dam so that they may spawn.

"Q. I see. Now, before you go into the Mud Mountain Dam count, looking at Plaintiff's Exhibit Number 14, is Mud Mountain Dam shown on there?

"A. Yes, it is.

"Q. And it is shown where?

"A. It is shown upstream, or to the right of the Muckleshoot Indian Reservation, the section labeled as White River.

"There is a red mark for the dam, and a blue arrow showing the reservoir.

"Q. All right, you may continue.

"A. Mud Mountain trap count on total fish starts in 1940, and the dam did cause us some trouble at that time, and the counts shown here, the counts start low.

"In the 1940's the counts started at, well, in 1940 at 111; the next year, 1941, 1,500; moved up into the five to 7,000 bracket, and in 1950 reached a total of 15,653 salmon past Mud Mountain.

"Mr. McLEOD: There are all figures for fish hauled around Mud Mountain Dam?

"THE WITNESS: That is right.

"A. (Continuing) the last figure, where the catch was above 7,000, is in 1954.

"The number hauled around Mud Mountain since that time has ranged lower, and since 1957 has not reached 3,000 fish.

LASATER, Direct

(R.S. 687)

"Q. Now, do you consider this significant, a significant decline?

"A. Yes, I do, when it is compared with the Puyallup Indian catch as shown on page 197.

"Q. I see. Now, one further clarification question, Mr. Lasater.

"Referring again to Plaintiff's Exhibit Number 14, I gather from the fact that these fish are trucked around the dam that it must mean that there is some spawning area above Mud Mountain Dam, is that correct?

"A. Yes. The significance of the other figures there, declining, I believe can be found, since I was using total catches, on page 197, on the records of the Puyallup Indian catch, which start in 1953 at 106; 1954, 3,210—.

"MR. MCLEOD: Just a second. Now, where is this?

"THE WITNESS: This is page 197. The bottom right-hand table.

"MR. MCLEOD: And what is the title of it?

"THE WITNESS: Puyallup Indian, Puyallup River, Numbers of Fish Taken by Gillnets and Set Nets.

"MR. MCLEOD: That ranges from 1935 through 1963, is that correct?

"THE WITNESS: No, no. On the left is the Nisqually table, and it ranges from 1953 to 1963.

LASATER, Direct

(R.S. 688)

"Just the lower right-hand table.

"MR. MCLEOD: Why didn't you include from 1935 there?

"THE WITNESS: I understand there was no commercial fishery on that river in those years.

"MR. MCLEOD: Well, you should still have escapement figures, shouldn't you?

"MR. CONIFF: Your Honor,—

"THE WITNESS: This is not escapement here, this is catch.

"MR. CONIFF:—I would presume Counsel could clarify on cross examination any questions he might have.

"THE COURT: He is talking about catch.

"MR. MCLEOD: He is going so fast I can't keep up with him, though.

"THE COURT: All right, continue.

"MR. MCLEOD: Excuse me. Could I ask just one question on this chart?

"Is this taking into consideration the Muckleshoot fishery on the White River?

"THE WITNESS: I have just been through that.

"MR. MCLEOD: Yes, but these figures that you have here, that's just the Puyallup fish?

"THE WITNESS: That is right.

"MR. MCLEOD: You are not considering the —

"THE WITNESS: They are not a part of this. Is that the question?

LASATER, Direct

(R.S. 689)

"MR. MCLEOD: Yes, the Muckleshoot catch is not included in here?

"THE WITNESS: No.

"MR. MCLEOD: It is separate?

"THE WITNESS: It is separate, and the table just above it on the same page is the Muckleshoot catch.

By Mr. Coniff:

"Q. Would you read the captions on the tables?

"That may clarify the situation on the respective tables.

"A. The tables that I am referring to on page 197, the first that I have gone to is on the top right-hand side of the page, and it is entitled "Muckleshoot Indians, White River, Numbers of Fish Taken by Set Nets, Spears and Dipnets."

"Directly below that is the next table I am referring to labeled, 'Puyallup Indians, Puyallup River, Numbers of Fish Taken by Gillnets and Set Nets.'

LASATER, Direct

(R.S. 690)

"MR. CONIFF: Is the situation clarified now, Counsel?

"MR. MCLEOD: As far as coming from him, as far as possible, coming from him.

"Q. Now, would you continue then? Would you explain to the Court the significance that these, of the data that is contained on these tables?

"A. The significance is that I have gone through three counts where the runs to the, or catches to the various areas were declining. Now, I will read the total salmon catches by the Puyallup Indians from 1953 through 1963: 1953, 176; 1954, 3,210; 1955, 1,638; 1956, 5,904; 1957, 12,417; 1958, 14,901; 1959, 17,004; 1960, 15,740; 1961, 46,778; 1962, 33,676; 1963, 75,092.

"I relate the decline in the other counts to the increase in this catch.

"MR. MCLEOD: In what?

"THE WITNESS: I relate the decline in the other counts given to the increase in the catch by the Puyallups at the mouth of the river.

"Q. Now, I believe—

"MR. MCLEOD: I will object to this answer, and move that it be stricken on the grounds that this witness is not, has not shown the qualifications, or that he has made these records, or that he has sufficient background to testify, or make the analysis that he is making of these records, because he has failed to consider other factors in the decline in the fish runs that are very significant, and I believe that

LASATER, Direct by Coniff

(R.S. 691)

we will show are more destructive to the run than anything that the Indians could have done at any time.

"THE COURT: The motion and objection will be denied.

"Q. Mr. Lasater, have you visited the various spawning areas of the Puyallup River?

"A. Not all.

"Q. But you have visited some of them?

"A. Yes.

"Q. Would you classify that these areas were good spawning areas for the various specie of salmon which are indigenous to this river system?

"A. The river, of course, varies, but much of the Puyallup system is good spawning because of cool water, and the copious amounts of clean gravel.

"Q. In you opinion, do you believe, based on your observations of the spawning areas, do you believe that the spawning areas are being utilized to the capacity over the past few years in view of the escapement counts you have referred to?

"A. I would hesitate to reply to this. I am not as well qualified as some others.

"I was more of a crew member on the spawning ground count.

"I would say that, from what I saw, the grounds could accommodate more spawning.

"Q. That is all I wanted.

"MR CONIFF: No further questions of this witness.

LASATER, Direct by Coniff

(R.S. 1022)

JAMES A. HAMILTON'S TESTIMONY

(R.S. 1022-1040)

JAMES ARTHUR HAMILTON, called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you please state your name and address?

"A. My name is James Arthur Hamilton, 10345 Homestead Lane, Beaverton, Oregon.

"Q. Who are you presently employed by?

"A. I am employed by Pacific Power & Light Company as their fishery biologist.

"THE COURT: Fishery what?

"THE WITNESS: Fishery biologist.

"MR. CONE: Dr. Hamilton, when you speak rapidly it is very difficult to—for me to catch everything that you say. So might I just ask as a courtesy that you try to slow down?

"THE WITNESS: I will be glad to do so.

By Mr. Coniff:

"Q. Are you appearing here today in any—on your employer's behalf in any capacity?

"A. I am not.

"Q. Could you tell the Court, please, your educational background?

"A. My undergraduate work at the University was carried on in Biology at the University of British Columbia from 1939 to 1943.

"I received my Bachelor's degree in 1944.

HAMILTON, Direct

(R.S. 1023)

"Following that I did postgraduate work in Zoology, Chemistry, at the University of British Columbia, and received my Master's degree in 1947.

"I then went on and took further post-graduate work at the University of Washington and received my Doctorate in Zoology and Fisheries at the University of Washington in 1955.

"Q. What has been your professional experience prior to the time you became employed by Pacific Power and Light Company?

"A. I was employed part-time in 1941 to 1942 by the International Pacific Salmon Fisheries Commission.

"I did summer work while attending the University of British Columbia, at which time I carried on tagging studies in the Straits of Georgia on Sockeye salmon.

"I also carried on some tagging studies at the traps on the southern tips of Vancouver Island, and that was done in 1942.

"Following my work at the University, I then

went to the International Salmon Commission as a permanent employee, remained with them until 1956.

"My earlier work with the Salmon Commission involved population enumerations in various streams, for which I was responsible for the enumeration.

"I also spent a considerable amount of time on ratio studies, dealing principally with meristic

HAMILTON, Direct

(R.S. 1024)

characters, studies of scales, studies with scales for purposes of identifying the various races of Sockeye in the Fraser River, which would be ultimately used for identification of the various races as they pass through the commercial fishery which would ultimately be necessary and/or desirable for regulation purposes.

"Also my work with the Salmon Commission involved studies of the environments, particularly the temperature environment as it relates to the production of Sockeye salmon population to try to evaluate what the controlling factors were in reproduction of Sockeye salmon.

"Also, part of my studies involved work at the Baker Dam—on the Baker River in Washington, studies that were designed to determine the effects of the power project on downstream migrants.

"Q. I see. How, Doctor, could you describe the life cycle of the anadromous fish or salmon—salmon, for example?

"A. I am sure you are primarily interested in the life cycle of the salmon in the Puyallup River.

"There are four species of salmon in the Puyallup, as has already been brought out here: the Chinook, Silvers, the Chum and the Pink salmon.

"Parts of their life history are quite similar; other parts are quite divergent.

"All species deposit their eggs in the gravel where the eggs remain from the fall or winter, when-

HAMILTON, Direct

(R.S. 1025)

ever they deposit them, through to the emergent period.

"After hatching, the young alevins remain in the gravel, using up the yolk sac, which is stored, or the yolk, I should say, which is stored in the yolk sac.

"After this is absorbed or partly absorbed the fish emerge from the gravel and then are known as fry. This is where the divergence occurs in some cases.

"Pink Salmon and Chum Salmon fry leave the gravel and move directly to sea. There is very, very little, if any, fresh-water rearing, as we call it. They move directly to sea.

"Now we come to the next form, which is the Chinook salmon, and the Chinook salmon in the Puyallup River is primarily, I think, what we would call the fall variety, fall race.

"They tend to remain in fresh water a little longer, emerge in the spring. They will migrate downstream at a slower pace, you might say, and remain in the fresh water feeding a little longer than the Pink salmon and the Chum salmon.

"There is some evidence that some Chinook will remain for extended periods of time, several months before they actually reach the salt water. It causes some question as to just what they do when they do arrive at salt water.

"There is some indication that they will tend

HAMILTON, Direct

(R.S. 1026)

to hold up down for a considerable length of time.

"MR. CONE: You dropped your voice at the end of the sentence. I didn't catch it.

"THE WITNESS: What was that again?

"MR. CONE: You dropped your voice at the end of the last sentence and I couldn't catch it. I am very sorry.

"A. I think my last sentence covered this particular

point, and it was to this effect, that there is some question as to how long the Chinook salmon actually remain in the estuary waters. There is some indication they may remain for an, for extended periods of time.

"Now we come to the Silver Salmon or Cohoe Salmon. They, unlike the previous three, do remain in fresh water for about a year, and at the smolting stage, at which time the fish are probably a hundred to 120 millimeters, at that stage again in the spring they migrate to the sea.

"Now, as far as the adults are concerned, there is a certain amount of dissimilarity between the species.

"The Pink salmon, as you know, return as two year-old adults, and also it is interesting to know that in this part of the country the run is almost entirely on an odd-year run.

"We see very few years on the other years, unlike Alaska and Northern British Columbia.

HAMILTON, Direct

(R.S. 1027)

"Now, the Chum salmon mature in three and four years and return at that stage.

"The Chinook salmon mature and return at ages anywhere from two, usually five, and occasionally I think they might find a six-year-old even in the Puyallup River.

"As far as the Silvers are concerned, they return as two and three-year-olds.

"When they return as two-year-olds, they call them Jacks. A three-year-old is a normal age of Silvers in this part of the country.

HAMILTON, Direct

(R.S. 1028)

"Q. Now, could you describe the Puyallup River, Doctor, in terms of anadromous or salmon production, the salmon indigenous to that system?

"A. Well, in answering that question you have to consider several different things, and if I could refer to this map over here (indicating)—

"Q. Yes.

"A. (Continuing)—showing the spawning areas.

"Q. Yes. That is Plaintiff's Exhibit No. 14.

"A. (Witness leaves witness stand.) You find here, and I have to look at this very closely, you find here that the Chinooks in the system are found in the Puyallup River, also in Voight's Creek, in the Carbon River, although I understand that as far as the Carbon River is concerned there's some difficulty in observing fish because of the transparency of the water, and South Prairie Creek is apparently very readily observable, and is an important producer of Chinook salmon. I did observe South Prairie Creek myself last month. Of course, there were no spawners at that time, but I had an opportunity to look at the stream at various locations, and in my experience it did appear like a good Chinook stream. Then, of course, we have the Chinooks going up the White River, where they are counted at the Mud Mountain Reservoir, or Mud Mountain Dam.

"The silver salmon tend to be distributed and found in more of the smaller streams. This is a natural characteristic of the silvers. We find that

HAMILTON, Direct

(R.S. 1029)

in Oregon, Washington, British Columbia. They tend to inhabit the smaller tributaries; seldom found in the very big streams. The South Prairie Creek, as indicated here, is a producer of silvers, as is a considerable number of tributaries up above the Mud Mountain, and also the Puyallup, as to silvers and some of these smaller tributaries such as Clear Creek and Kelly Creek, and Voight Creek too is a producer of silver salmon.

"Now, as far as the pinks are concerned, the pinks are found in South Prairie Creek, which is somewhat of the type of stream that you would expect to find pinks, although from my experience you do find pinks in some of the larger streams, unlike silvers. Then there is an indication that

pinks will spawn in the Puyallup as well. This map, of course, I would think limits the extent of the spawning areas. I would expect there are a considerable numbers of small tributaries which would also contain silvers, and to some extent pink salmon. When I was up at Clear Creek I did observe chum salmon spawning at that time, and that was in late January, which shows the late spawning very characteristic of that particular species.

"Now, I said that I needed to refer to several things in considering this matter of the Puyallup River, or Puyallup system, as a salmon producer, and might I refer to these (indicating)?

"Q. Yes, Doctor.

HAMILTON, Direct

(R.S. 1030)

"A. In the consideration of a system as a production area we have to take into consideration the history as we know it, we have to take into consideration the total catch, and here we find that the Puyallup as far as the Chinook are concerned will produce significant numbers of fish, has produced significant numbers of fish, which is certainly indicative of not necessarily its potential but what it is doing right now, and in the case of the Puyallup, as we can see from this graph, it is significant.

"The same thing applies to the silver salmon. We find that as far as the silver salmon is concerned for the White River, referring to the escapements here in the early years, that this was quite a productive area, producing significant numbers of fish. Now, remember that this is only one area in the whole Puyallup, just one tributary, and it is reasonable to expect that the rest of the Puyallup is doing somewhat the same thing, and this is a little deceiving in that we are only talking about one single tributary out of the whole system, and here we are talking about you might say the whole system. This is indicative of the capacity,

or not necessarily the capacity but indicative of what the river is actually doing right now, and it is doing considerably when you consider the numbers of fish that are involved in these catches. (Witness resumes witness stand.)

"Q. Now, Doctor, if this catch were to continue, what do you think would happen eventually to the runs of silver salmon, for example, in the Puyallup system?

HAMILTON, Direct

(R.S. 1031)

"MR. CONE: Just a moment.

"Your Honor, I would object to the expression of an opinion as to this river until he establishes that this particular gentleman has an expert knowledge as to this particular river. I think he is undoubtedly qualified to testify in the abstract or in the hypothetical as to what generally might happen, but as to this particular river, I don't believe he has laid a foundation, Your Honor.

"THE COURT: I am going to overrule the objection because I do think he is qualified to answer as to any river, based upon his studies, but if counsel wanted to pursue a particular river, he may do so.

"MR. CONIFF: Yes.

"MR. McLEOD: Excuse me. I would like to state another objection for the record.

"There has been no showing that this particular individual has any data or made any tests or studies of this particular river on which he could base any expert opinion.

"THE COURT: Your objection will be noted.

"MR. McLEOD: And I would like to move to strike all his testimony on that ground.

"THE COURT: It will be denied. You may have a continuing objection.

"Q. Dr. Hamilton, have you visited the Puyallup River and examined it with the view toward—have you visited the Puyallup River and examined it?

HAMILTON, Direct

(R.S. 1032)

"A. I did make a trip to the Puyallup River, and I believe it was on January 30th, it was a Saturday, and did observe some of these streams. Also I went down to the mouth and did observe the general fishing area, too.

"Q. Now, Doctor, have you reviewed data pertinent to the Puyallup River—

"A. Yes.

"Q. (Continuing)—in terms of salmon production?

"A. I have quite independent to the graphs that are prepared here prepared my own, or arranged, I might put it that way, my own data taken from the Washington Department of Fisheries Reports.

"Q. I see. Now, Doctor, I now ask you again, could you give us your opinion as to what you would expect to happen to the silver salmon in the Puyallup system, taking into account the catches which are shown on Plaintiff's Exhibit No. 33?

"A. (Witness leaves witness stand.) Well, recognizing that this is the escapement, only one tributary, namely the White River, and that this is the catch, we will say, of this year (indicating), now, to do this properly you should relate the escapements separately. The escapement here (indicating), it is very apparent that the escapements (indicating) are significantly larger than those at this point (indicating), and I would be inclined to say that the escapements in the river in general, if we were able to show all those escapements for all the tributaries, which show the downward trend like this (indicating).

HAMILTON—Direct

(R.S. 1033)

"Now, you might say, or some might say, that, well, everything looks very nice here, everything is building up, but the thing is that what is building up is the catch is causing this build-up, not the escapement, and if I was responsible for this particular river, if I can put it this way, I would

be alarmed at a condition of this sort. I would be inclined to feel that it was only a matter of time before this whole trend started to show downward. (Witness resumes witness stand.)

"Q. Do you know of any other river system where this downward trend has occurred?

HAMILTON, Direct

(R.S. 1034)

"A. Yes, then I could refer to the Rogue River, for instance. That has definitely shown a downward trend for many years. The fishery there started back in, oh, I can't remember the date precisely, but it started about 1880, as I recall, and the fishery was terminated in 1935, but there was a very substantial downward trend, and it was attributed to a large extent to that fishery.

"Q. To the fishery?

"A. To that fishery, yes.

"Q. Now, Doctor, have you examined the photographs which have been admitted into evidence in this case?

"A. Are you relating to the ones that were—

"Q. Yes.

"A. The ones that show the fishery?

"Q. Yes.

"A. Yes, I have examined those.

"MR. CONIFF: And perhaps I should refer to them by exhibit number, if I could.

"For the record, I am referring to Plaintiffs' Exhibits Number 25, 24, 23, 22, 19, 18, 20, 21, 16, 15, and 17.

"Q. Have you examined the large or rather long scroll-type map which has been admitted into evidence as Plaintiffs' Exhibit No. 13, which is located up here (indicating)?

"A. Yes.

"Q. Now, have you yourself observed any fishing effort

HAMILTON, Direct

(R.S. 1035)

in the Commencement Bay-Puyallup River area?

"A. I can't say that I have actually observed any fishing. I did see a net, or two nets, one attached to the bridge pier, and one attached to a piling dolphin, but I question whether they were actively fishing.

"Q. And, Doctor, I take it then you also have examined what has been admitted into evidence as Plaintiffs' Exhibits Numbers 37 and 38, which show the timing of the catches in the Puyallup system for the past few years?

"A. Yes, I have observed it.

"Q. Now, I ask you, Doctor, do you have an opinion as to the effect of a fishery as is shown by these exhibits upon the anadromous fish population of the Puyallup River?

"MR MCLEOD: I will renew my former objection, your Honor, for the record.

"THE COURT: The objection will be overruled.

"A. Well, to start with, in examining the layout of the fishery, recognizing, of course, that all the gear shown there was not in there at any set time, that it was there during various periods of time during the fishing season, I felt that the fishing effort which was shown there in the photograph and on the chart would be extremely effective in cropping or harvesting the Puyallup River runs.

"I also felt, too, or do feel, that such a fishery as I observed in those diagrams would take a very significant part, or could take a very significant part of the run.

HAMILTON, Direct

(R.S. 1036)

"Now, the reason I say this, I was particularly impressed with the net complex down near the mouth, which you might consider as a trap, as a catching device, for the principal reason we know that salmon when they come to estuaries, and this has been well documented, when they come to

estuaries they will tend to mill, move around in the particular area, which means that if there is a fishery being carried on in that particular area the fish are exposed to it over and over again.

"Now, in a fishery where the fish are migrating, that can be extremely effective as well, but when they are migrating they are not exposed over and over again to the same gear, but other gear operated by other individuals, we will say.

"Also, too, in looking at this graph, and I will refer to Exhibit 37 and Exhibit 38, the length of the fishing time, the fish are exposed in this particular fishery to the fishery for a long period of time, and as a result, I have come to the conclusion that this could be an extremely effective fishery and that it would take a very sizable portion of the population.

"I might just add, too, that as far as the Fraser River is concerned, it is recorded that the gillnet fishery on the Fraser alone is capable of taking 98 per cent of the salmon migrating upstream.

HAMILTON, Direct

(R.S. 1037)

"Also, too, it is published in the Annual Reports of the International Salmon Commission that the fishery in U.S. waters, purse seine, reef nets, gill-nets, are capable of taking almost 100 per cent.

"Now, we might have thought at one time that a fishery is not capable of doing this sort of damage, but it is.

"Q. Now, Doctor, what does the term "regulation of a fishery" mean to you?

"A. Well, to me regulation of a fishery means the controlling of the taking of fish by imposing such restrictions that will limit the amount of gear, the type of gear, the number of fish, or where the gear may be operated.

"Q. Do you consider regulation of the fishery necessary, of any fishery?

"A. Yes, it is an extremely important management, and with the types of gear that are available now, the

types of equipment for catching fish, I definitely feel that regulations, regulation of a fishery is necessary in order to maintain the runs.

"If we are not interested in maintaining runs for the future, that is something else again.

"Q. Now, to your knowledge, is it a common practice
HAMILTON, Direct

(R.S. 1038)

to regulate any type of fishery?

"A. Oh, yes, this is very common practice. It is practiced in Alaska, British Columbia, Oregon, Washington, California, for commercial fisheries, not only for salmon but other species as well, and it is practiced in the sports fisheries.

"Q. Can you tell us how the regulations of fishery for salmon are generally established, from your point of view as a biologist?

"A. Well, the basis for the fishery regulations is really the needs of the fish and the resource. That, I think, is the basis for any regulation.

"Now, don't misunderstand me, we are, too, at all times, as far as management is concerned, concerned with getting the maximum harvest, getting as many fish produced as we possibly can, and regulation is one way of doing this, and other ways that are being practiced, of course, include artificial spawning channels, incubation channels, hatcheries.

"They are all being directed toward trying to get the maximum harvest, and as far as regulation of the fishery is concerned, it is designed to this end, of getting the optimum escapement so that we can produce the maximum of fish possible for the fishery.

HAMILTON, Direct

(R.S. 1039)

By Mr. Coniff:

"Q. Doctor, do you know of any occasions where a commercial fishery for salmon has been closed for extended periods of time in order to achieve these—

"A. I think my best reference is the Salmon Commission again with reference to the Sockeye fishery on the Fraser, and to protect certain races, the fishery can be closed for a month, five weeks, and that is particularly true in connection with the Stuart Lake race, which migrates up fairly early and passes through the fishery in July.

"There have been extensive closures on the Fraser River during July to protect this particular race.

"Now, we can cite another example.

"Just last year the Columbia River fishery was closed for almost all of five weeks, from the end of June through the month of July, to protect the summer Chinook which were at low ebb.

"When I say closed, in almost all of that time they allowed two days of fishing, which is nothing more than a token fishing effort to get some idea of the strength of the run. When they found it was still low, the run or the fishing—the fishery was closed up.

"Q. Now, in your opinion, Doctor, should natural spawning areas for anadromous fish, for salmon, be utilized to their capacity?

"A. Well, this is just common sense, I believe.

HAMILTON, Direct

(R.S. 1040)

"We have—Nature has provided us with a, you might say, a piece of ground that is capable of providing a food product for us. To not let Nature do the job does not make common sense. It will do it at no expense to us, and it will do a very efficient job.

"Now, there are those who say, well, we can do all this in hatcheries.

"The hatchery system is not conceived to do this. The hatchery system is designed to protect the fish where, for instance, a dam is built, the spawning area has been inundated, and the spawning area is no longer available. So a hatchery is designed and built for that purpose, to take the place of a natural ground.

"But, where the natural ground is available, it should be utilized and utilized to the maximum, and that is where the regulation of the fishery is so important to provide and find out what the capacity for a particular spawning area or particular system is, to find out what that is, to produce fish and utilize it to the maximum.

"MR CONIFF: Thank you, Doctor. No further questions.

* * *

CLIFFORD J. MILLENBACH'S TESTIMONY **(R.S. 1086-1103)**

* * *

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you state your full name, please?

"A. Clifford J. Millenbach.

"Q. How do you spell that last name?

"A. M-i-l-l-e-n-b-a-c-h.

"Q. Where do you reside, Mr. Millenbach?

MILLENBACH, Direct

(R.S. 1087)

"A. I reside at 2552 John Luhr Road, Olympia.

"Q. I see. By whom are you presently employed?

"A. I am employed by the Department of Game of the State of Washington.

"Q. And in what capacity?

"A. As Assistant Chief for the Fisheries Management Division.

"Q. And would you please tell us what your educational background is, sir?

"A. I graduated from the University of Washington in 1940 with a Bachelor of Science degree in fisheries, and this is the basic experience I have in education.

"Q. I see. Could you briefly describe to us your professional experience since that time?

"A. Six months after I graduated, I was employed by

the Department of Game as hatchery assistant. Approximately one year later I was moved into the office and placed in charge of the hatchery program. And with the exception of service in the Second World War, I remained in charge of the hatchery program until 1956.

"I would like to point out that in this capacity I was directly responsible for the development of the steelhead program of the Department as it is now known. This involved working closely with our district biologists in the pursuit of a great number of marking experiments which developed a knowledge of the biology of steelhead, and which developed the techniques which are now applied in our steelhead program.

MILLENBACH, Direct

(R.S. 1088)

"Q. I see.

"A. In 1956, I was promoted to my present position, and in this position I have the opportunity to broaden my association in the field of the entire program. And also I have had the opportunity to become well acquainted with the steelhead programs in the states of Oregon, California and British Columbia.

"Q. I see. Now, how long has it been that you have had your present position, Mr. Millenbach?

"A. I have been in my present position since 1956.

"Q. Since 1956. Well, I suppose a good place to start would be for you to tell us what a steelhead is, from your point of view.

"A. A steelhead is a rainbow trout which normally spends approximately two years of his, his first two years in fresh water; then due to physiological changes, it moves into the ocean where most of them spend another two years before returning to the area from which they originated.

"Let me explain that there is a considerable variation in this life history pattern. The majority of the fish do follow this pattern. Some spend only

a year in fresh water, some spend three years, occasionally four years. We have a number of fish that do not mature in four years of age, and they stay in the ocean longer, and they grow to a larger size.

"I might further explain that a steelhead is quite different to a salmon in that it does not die after

MILLENBACH, Direct

(R.S. 1089)

spawning. The survival through the second and third spawning, however, is relatively small. And a special study on the Green River, for example, approximately 5 per cent of the population have spawned previously.

"Q. Now, about how large are the steelhead? Do you know about how large the downstream migrant steelhead is when he begins his migration to the salt water?

"A. The young steelhead generally are about six to eight inches in length, and average roughly about a sixth of a pound apiece.

"Q. About how large are these fish when they return to fresh water, after the portion of their life cycle has been spent in salt water as an adult?

"A. Fish returning after roughly two years in the ocean generally weigh six to seven pounds.

"Those that stay out longer, for instance, one more year, will be twelve to fifteen pounds. A twenty-pounder usually stays out four years or more, or have spawned previously and gone back out to sea.

"Q. Now, these downstream migrants then spend, how long do the downstream migrants spend in fresh water?

"A. The normal cycle in the majority of the fish will spend two years in fresh water.

"Q. I see. Now, during this period of time, are they vulnerable to sports fishing?

"A. As I mentioned, they reach a length of six to eight inches and generally speaking the minimum size

limits for trout in the State of Washington is six inches, and this makes them vulnerable to a trout fishery, if a trout fishery is permitted.

MILLENBACH, Direct

(R.S. 1090)

"Q. Well, my next question is then, does the Department of Game make any efforts to protect these downstream, or the steelhead during this early portion of fresh water, the fresh-water portion of their life cycle?

"A. As I mentioned, the Department has spent a great deal of time in learning and obtaining information on the life history of these steelhead, and we know that the primary migration period exists from about the 1st of April to near the end of May; that these fish are, for the most part, or the downstream migrants are six to eight inches in length. They are in a period of rapid growth, and they can be readily taken by sports fishing gear, particularly with bait, and any type of artificial lures that are extremely effective.

"So the Department of Game, in its management of the streams, particularly in Western Washington, for steelhead production, has established regulations which protect these downstream migrants. They are protected during the spring of the year, both by season period of protection, and also in some areas we use a 10-inch minimum length.

"Q. Mr. Millenbach, do you have a copy of the regulations of the Department of Game with you?

"A. I have a certified copy of the temporary regulation which was established for the season of 1965.

"Q. I see.

MILLENBACH, Direct

(R.S. 1091)

"MR. CONIFF: May I have this marked as Plaintiff's exhibit? I might state to counsel, and to the Court, that the regulations of the Department of Fisheries are being prepared, but it is much more

lengthy and a more involved operation than the preparation of the Game Department regulations.

(Plaintiff's Exhibit No. 40 marked for identification)

"Q. Showing you this document which has been marked for identification as Plaintiff's Exhibit No. 40—

"MR. CONE: May I just take a moment to examine it, Your Honor? Well, I won't take the Court's time to examine it now. If you assure me that these are the regulations, I have no objection.

"MR. CONIFF: They are. I will move for their admission.

"THE COURT: There being no objection, it will be admitted as Exhibit 40.

(Plaintiff's Exhibit No. 40 now received in evidence)

"Q. Now, Mr. Millenbach, does the Department attempt to protect the adult steelhead in the portion of their life cycle which is prior to their spawning?

"A. Yes. there are a number of regulations which relate to the taking of the adult steelhead.

MMILLENBACH, Direct

(R.S. 1092)

"A. (Continuing) First there is a regulation within the certified copy which specifies the—

"Q. You may refer to these (hands to witness).

"A. (Continuing)—to the time, place and manner in which the steelhead may be taken on sports gear. Sports gear is limited to rod and reel, and which generally speaking is a rather inefficient type of gear. I point this out because it relates to the fact that the gear itself then permits an escapement of fish to the spawning grounds even though the season is open.

"I wonder if I might explain using the map the total regulations as they apply to this system?

"Q. Yes, I think that would be helpful. You may step over to Plaintiff's Exhibit 14 and use the marker if you like, Mr. Millenbach.

"A. (Witness leaves witness stand) We are talking about the adult steelhead. The season as it now exists on the Puyallup River system begins usually about the 1st of December, I think actually it was about the 6th of December last year, and it permits the taking of steelhead by sports fishermen, rod and reel, limiting a daily catch to two fish per fisherman, a possession limit of four fish, and a season limit of thirty fish. These are all restrictive and protective regulations.

"Now, further to insure escapement of spawning fish throughout the open season, there have been

MILLENBACH, Direct

(R.S. 1093)

place upper deadlines on the main tributary, for example, on the White River, the upper deadline above which fishing is not permitted is the Puget Sound Power and Light diversion approximately a mile upstream from the town of Buckley.

"Q. Excuse me, Mr. Millenbach, if I hand you a marking pencil, could you mark the deadlines on Exhibit 14 for us? (Counsel hands to witness)

"A. My recollection of the sketch, it doesn't permit really a good picture of portions of the river system, I mean the relative lengths are not too well depicted, but I think we can get our points across.

"The Puget Sound Power and Light diversion is in this relative position to the Mud Mountain Dam (indicating), so then on the White River we have the upper deadline, and once the steelhead gets to this point (indicating), gets through here (indicating), it has the opportunity to continue and spawn. Likewise on the Carbon River, another native tributary, the upstream deadline is the mouth of South Prairie Creek, one of the very major important tributaries of the system, and the deadline is there (indicating), above which no fishing for adults is permitted. On the Puyallup River the deadline is a railroad bridge approximately three miles east of Lake Kapowsin, but it is in an area near what they call Electron, approximately there

(indicating), and here again this is near a Puget Sound Power and Light discharge of water from a diversion.

MILLENBACH, Direct

(R.S. 1094)

"Q. Would you initial or indicate in some manner that these marks you have made are deadlines?

"A. (Witness complies with request of counsel) So then with the deadline on the river, we have a positive escapement of fish beginning with the opening of the season. Once the fish get that far they can proceed and spawn. Likewise we have assurance for escapement for spawning purposes in that tributary streams are not open. Voight's Creek is not open. As I mentioned, this was a limit on the Carbon. South Prairie Creek and Wilkeson Creek, two tributaries, are not open. Nor are a number of the smaller tributaries which do provide steelhead to the Puyallup River.

"Q. I gather not all of these smaller tributaries you are referring to are depicted on this illustrative exhibit.

"A. No, they are not.

"Q. All right. I take it then from your testimony, Mr. Millenbach, that you are familiar with the Puyallup River system?

"A. Yes, I have been on it, I have flown the entire system and been on it a number of times.

"Q. In your opinion, is this an important steelhead producing river system?

"A. Prior to the Indian net fishery in the lower area—

"MR. CONE: Your Honor, may the witness be instructed the question may be answered yes or no and then he may explain his reasons?

MILLENBACH, Direct

(R.S. 1095)

"THE COURT: Objection sustained.

"Q. Would you just answer whether—

"A. Yes, in my opinion, it is.

"Q. Would you tell us what your opinion is, Mr. Millenbach?

"A. I base that on the records that, which as I mentioned, the Puyallup River would be leading steelhead producer in Western Washington prior to the period of that fishery at the mouth, and last year the catch indicated it was fourth in the State.

"Q. Now, is the production of the steelhead in this river system totally due to natural spawning, or is there some other reason or contributing factor to the production?

"A. The Department of Game has established a very successful and important steelhead program through the procedure of rearing steelhead in hatcheries to the downstream/migrant size. (Witness resumes witness stand) And the Puyallup River has been on this type of supplemental planning since 1952.

"Q. I see. Do you have this data with you and available as to the plants?

"A. Yes, I do.

MILLENBACH, Direct

(R.S. 1096)

By Mr. Coniff:

"Q. Now, can you explain how this planting program has been applied to the river since it was initiated?

"A. The average annual stocking on the Puyallup River has been approximately 65,000 downstream migrantsized steelhead.

"These are generally planted in the latter part of April and the early part of May, and occur in a closed period as far as fishing is concerned.

"Q. Do you have any data or records or any way of determining how successful this program has been?

"A. Two years ago the Department of Game personnel were instructed to maintain a record of the number of fish they observed which had deformed dorsal fins, and let me explain that in our hatchery rearing program that due to the fact that the fish are concentrated in a rearing pond they feed very actively, and the dorsal fin is frequently perma-

nently deformed and damaged, and this is a certain sign of hatchery rearing, if you note a deformed dorsal fin on a fish.

"Now, in nature there is the odd case where due to a predator or something a fin becomes mutilated, but it is extremely rare, and in our hatchery procedure the percentage of fish that receive the deformed dorsal fin varies depending on the loading of the pond, but this is a certain identification of hatchery origin.

MILLENBACH, Direct

(R.S. 1097)

"Now, in the 1962-1963 season our personnel maintained a record and observed 61 per cent of the fish they checked had the deformed dorsal fin.

"Q. Now, Mr. Millenbach, have you examined the map, the large scroll map which has been admitted into evidence as Plaintiffs' Exhibit 13?

"A. I have seen it only as used in the court.

"Q. But you have—

"A. Yes.

"Q. Have you examined the photographs which have been admitted in evidence?

"A. I have not examined that in real detail; I have seen them.

"Q. Well, have you personally observed any of the net fishery in the river?

"A. At times, as I have gone by the Puyallup River I have seen portions of the net fishery.

"Q. Now, do you have an opinion as to the effect of this net fishery on the steelhead resources of the Puyallup River system?

"Just answer that yes or no.

"A. Yes.

"Q. Would you please tell us what your opinion is?

"A. In my opinion the effect on the steelhead resources of the Puyallup River relates, of course, to the amount of gear fished, the manner in which it is fished, and the type of gear that is fished.

"It is my opinion that if there were no supple-
MILLENBACH, Direct

(R.S. 1098)

mental plantings on the Puyallup River, and net gear was fished to its capacity, and without any control of this fishery, the steelhead resources of the Puyallup River could not be maintained.

"Q. Now,—

"MR. MCLEOD: If your Honor please, I will object to this witness coming to this conclusion on the grounds that he hasn't shown that he has the factual data from which to support this conclusion; second, that he hasn't been properly given a hypothetical question including the factual data and all of the factors involved in this fishery, and I would therefore like to have a continuing objection to his testimony, and I would like to move to strike it.

"THE COURT: The objection will be overruled; the motion will be denied.

"You may have the continuing objection.

"Q. Now, Mr. Millenbach, does the Department of Game—let me rephrase.

"In your opinion, is it important to have a complete regulation or a total regulation of all fishing effort on steelhead, insofar as the steelhead are concerned in the Puyallup system?

"A. In my viewpoint, it is impossible to manage a fishery without total regulation. I have attempted to point out that the Department now has very restrictive regulations in regard to the sports take

MILLENBACH, Direct

(R.S. 1099)

of steelhead, and we have over the years developed a record to substantiate the fact that these types of regulations do sustain the fishery at a high level.

"I would like to reiterate and emphasize that first of all we have a guaranteed escapement of fish into the upper reaches as a result of the upstream deadlines. Our season is limited to only a portion of the duration of the run. The season

on the Puyallup terminates the end of March. The steelhead run in the river until June. So there is a positive escapement from that angle.

"The gear itself is very restrictive, and in furthering the steelhead program we have established on the Puyallup River a closure from the end of the winter steelhead season until July 1, which provides for almost full protection of the downstream migrants.

"In other words, you can only catch a fish once, so you have to protect in this instance both the juvenile and provide for some escapement of adult fish.

"Q. I see. Now, as I recall your earlier testimony, I believe you marked on the map that—I will rephrase the question.

"It is possible to catch fish below that deadline you have indicated on the White River, is that correct?

"A. Yes.

MILLENBACH, Direct

(R.S. 1100)

"Q. Now, the streams above the Mud Mountain Dam, which is portrayed on Plaintiffs' Exhibit Number 14, are they utilized by steelhead for spawning purposes?

"A. Yes, they are. The fish which are trapped at the diversion dam downstream from Mud Mountain Dam are hauled and liberated above Mud Mountain Dam, and most of that watershed is available to spawning steelhead.

"I might state further that these regulations prohibit the taking of fish over twenty inches in the White River, the tributaries, which is further protection of spawning steelhead.

"Q. Now, do you know when this diversion dam was built here on the White River?

"A. It was finished approximately in 1940.

"Q. Was there any count made of the steelhead that was transported around the dam at that time?

"A. We have the records and the number of fish which have been transported since 1941, around Mud Mountain Dam.

"Q. I see. Could you tell us what these records show? And if you have the records with you, you may refer to them.

"A. I can state from memory that generally the magnitude of the steelhead run was close to 2,000 fish for a period of approximately twelve years, and since that time there has been rather a sharp decline, and the number hauled last year was 274 fish, steelhead.

MILLENBACH, Direct

(R.S. 1107)

"Q. Do you happen to know if there is a fishery on what is denominated on Plaintiffs' Exhibit No. 14 as the Muckleshoot Indian Reservation?

"A. Yes, there is a net fishery for steelhead on the reservation.

"Q. Do you have any figures as to the numbers of steelhead taken by this fishery?

"A. Again, the earliest data we have, and this is rather meager in that our source of data is not a firm or positive one—let me point out to the Court, if I may, since steelhead by statute are a game fish, there are no regulations or provisions for handling them in a commercial manner, and consequently there are no fish tickets as apply to the salmon catch or salmon take, and our information then has been limited to what has been supplied by the Department of Fisheries, which was obtained primarily by personal contact and discussion with the Indian people who engaged in the fishery.

"Q. Now, the Indian people—you are referring now to the Indian people residing on the Muckleshoot?

"A. The Muckleshoot Reservation.

"Though to answer specifically your question, the early data we have dates back to 1953, '54, at which time the Indian take was between one and two thousand fish, yearly average.

"According to the best records we have been able to obtain they took seven hundred fish last year..

MILLENBACH, Direct

(R.S. 1102)

"Q. I see. Now, how about the sports catch of steelhead in this stretch in the White River during this period of time?

"A. Again our records are limited as to time.

"The first year for cards was the 1947-1948 season. This was the first year in which we have a record of the sports catch, and for that year, the following nine years, the average catch was approximately 767 fish, and the last six years there has been a reduced escapement also, as I pointed out in Mud Mountain Dam, the average catch has been only 334 steelhead.

"Q. That is in the White River?

"A. This is the sports catch in the White River.

"Q. What in your opinion is the most important factor in the decline that you have just described in terms of the sports catch?

"A. Because of the long, rather long period of some twelve years or so in which the escapement of steelhead over Buckley Dam or hauled around Mud Mountain Dam was between one and 2,000 fish.

"There has been an intensive Indian fishery below there, reducing the numbers in recent years now, to where it was 274 last year.

"It appears to me that in view of this record that there is insufficient steelhead escaping up the White River system to maintain those stocks at a high level.

"Might I also include that the Department does

MILLENBACH, Direct

(R.S. 1103)

not have a supplemental program of planting hatchery fish on the White River, so that the rec-

ords do relate to the natural stock of fish that exist there.

"Q. I see.

"MR. CONIFF: No further questions.

"MR. McLEOD: Your Honor, I will renew my motion to strike on the grounds previously stated.

"MR. CONE: I think I may have twenty or twenty-five minutes worth of cross examination.

"Do you desire to continue now, or take the recess at this time?

"THE COURT: I think we should continue at this time, and we will see how we go along.

"MR. CONE: Thank you, your Honor.

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(R.S. 1130)

RICHARD VAN CLEVE'S TESTIMONY

(R.S. 1130-1149)

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you please state your name and address?

"A. Richard Van Cleve, 4537-51st Street Northeast, Seattle, Washington.

"Q. Would you please tell us what your educational background is?

"A. I received my Bachelor of Science degree in Biology from the University of Washington in 1926-27; attended the Fisheries, Pacific Fisheries, Stanford University, 1931; received a Ph.D. in Fisheries and Mathematics, at the University of Washington in 1936.

"In 19— do you wish me to continue?

VAN CLEVE, Direct

(R.S. 1131)

"Q. You might just continue on, and tell us your professional experience.

"A. Professional experience: In 1926 I took possession

of the International Pacific Halibut Commission as an Assistant Scientist, and stayed with them until 1941, when I was appointed Director of the Bureau of Marine Fisheries for the California Department of Fishery, the California Fish and Game Commission.

"It was at that time and in that capacity that I had charge of the research program, and the management program for both marine and anadromous fisheries in the State of California, and was particularly concerned with the salmon salvage programs in the Sacramento and San Quentin programs.

"We have a considerable program, a cooperative program, and with the Fish and Wildlife Service and the Department of the Interior, or the agencies in the Department of Interior, and attempting to maintain these salmon runs in the face of the irrigation and power developments in this area.

"We are also concerned with the management of the fishery in the Sacramento River, and outside, the troll fishery throughout the coasts of California.

"In 1946, in March of 1946, I took a position of Chief Biologist with the International Pacific Salmon Fisheries Commission, with headquarters in Westminster. And this, in this capacity I was in

VAN CLEVE, Direct

(R.S. 1132)

charge of the Research Program concerned with the Sockeye salmon on the Fraser River.

"And in 1946, I, as soon as I got in there, I was placed in charge, and with responsibility and, of the development and the management program for the Fraser River Sockeye fishery, which extended out into the Straits of Juan de Fuca, and was governed by the International Treaty between Canada and the United States.

"In 1940—well, during this time, too, it was my responsibility, it being my responsibility to govern the, direct the research program.

"I found it necessary to visit all parts of the Fraser River and become familiar with the various types of fisheries, Indian fisheries in this area, which extended from the Hell's Gate Canyon throughout the most, a good part of the watershed.

"In 1948, in September, I was appointed Director of the School of Fisheries at the University of Washington.

"In 1958 I was appointed Acting Dean.

"And in 1960, my title was changed to Dean, which position I still hold.

"Q. Are you a member of any professional societies?

"A. Yes. It is a long list of societies of oceanographic fisheries societies.

"I am Vice-President of the American Institute of Fisheries Research Biologists, and most of the

VAN CLEVE, Direct

(R.S. 1133)

societies that are concerned with oceanographic fisheries, and oceanography.

"Q. Have you published any articles, Doctor, concerning anadromous fish?

"A. Yes, I have. I have published several articles on the salmon problems in California, and was particularly concerned with the program of the realignment of salmon management.

"I have published articles regarding the Fraser River, the general program of the Fraser River.

"And then, among other things, recently I was, would have been concerned with the international regulations of international fisheries in the North Pacific, and specifically with the International North Pacific Treaty, and its operations.

"I published a paper on that in 1963 with Professor Johnson of the Law School of the University of Washington.

"Q. Now, Doctor, are you familiar with the anadromous fishery populations in the Puyallup River system?

"A. Yes. In connection with some of the work that

we were, that we 'contracted' with the Corps of Engineers, in 1953, I believe it was that we undertook the contract to investigate the effects of, or the various techniques for guiding young downstream migrants.

"And one of our particular responsibilities was the investigation of the possibility of use of elec-

VAN CLEVE, Direct

(R.S. 1134)

tricity in guiding those migrants.

"I had already had some experience with this at another fishery, and in the fire bowl district in California.

"It was this particular type of structure, and so we set up an experimental apparatus in the Buckley area, and we had an opportunity to—of course, we used mostly the stock that we introduced ourselves, but we did that, or we did have a natural stock coming down, and I was—I had an opportunity at that time to look periodically at the White River, and I have looked over the various tributaries of the Puyallup, but I have not made any particular study of these.

"Q. Now, Doctor, have you examined the exhibits which have been filed in this case this morning?

"A. Yes, I have.

"Q. Have you ever observed any net fishery in Commencement Bay in or around the mouth of the Puyallup River?

"A. Yes. I went down there just last month. I think it was on Thursday, two weeks ago tomorrow, I believe. And there was some, there was a fishery at that time, not very intense, of course.

"Of course, the river was very high, but we did see some nets in the river, and we talked with some of the people who were fishing there, and on the dock.

"At the mouth of the Puyallup River, I observed the nets that were lying there.

VAN CLEVE, Direct

(R.S. 1135)

"Then there was a monofilament net which was very easy to see. It was very easy to see this. And this is an extremely effective piece of type of fishing gear.

"Then, farther upstream, there was a rather interesting method of fishing being exhibited there, where the upstream ends of the net were attached to the, let's see, it would be to the right bank, and just above one of the bridges.

"And the rest of the net was held out from the bank by a long pole, forming a "V" fish trap for salmon that would migrate up the edges of the stream.

And the Indians at that time had three beautiful-looking Steelhead they had just caught.

"Q. Now, Doctor, based on your observation, and also based upon your review of the exhibits that have been filed in this lawsuit, do you have an opinion as to the effect of this Indian fishery upon the anadromous fish population of the Puyallup River system?

"MR. MCLEOD: I will object to this question.

"This witness has not demonstrated that he has made any scientific tests, or that he has sufficient data on which to base any opinion, and I will move that his testimony be stricken.

"I will also object to any testimony that he gives on the subject.

VAN CLEVE, Direct

(R.S. 1136)

"THE COURT: I think it would be well, Mr. Coniff, to explore a little bit more the Doctor's qualifications in that respect, if you would.

"MR. CONIFF: Fine.

By Mr. Coniff:

"Q. Doctor, have you received data published by the Washington State Department of Fisheries in their Annual Reports?

"A. Yes.

"Q. With regard to the Puyallup River?

"A. Yes.

"Q. The Indian catch records?

"A. Yes.

"Q. Have you examined what has been marked and admitted into evidence as Plaintiffs' Exhibits Numbers 33 and 34, which portray the relationship of the catches to the escapement?

"A. Yes. Of course, we, these don't show everything, because they, for example, the the Puyallup-White River Chinook salmon catch, a Silver salmon catch in 1964 is not up, largely because of my—I was informed that after the Indians were pulled out of the river—

"MR. MCLEOD: I will object to the Doctor's testifying as to any information that he has received that is hearsay.

"THE COURT: Objection sustained.

"MR. MCLEOD: I think he should be restricted as
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(R.S. 1137)

to what he knows of his own personal knowledge.

"THE COURT: Objection sustained.

"THE WITNESS: Your Honor, may I testify as to what I have read and as to what has been published?

"THE COURT: As to your studies, you may, yes.

"THE WITNESS: In 1964, the escapement to the hatchery, I think it rose ten times over the escapement in 1963.

"And this is associated with the fact that the—apparently there was no net fishery at the mouth of the river.

"MR. MCLEOD: I object to that, to the conclusion, your Honor, and move that it be stricken, on the grounds that this witness has shown no personal knowledge, and has made no tests, and is not capable of giving an expert opinion on this subject.

"THE COURT: The objection will be overruled.

"MR. McLEOD: Now, could I have a continuing motion to strike, your Honor?"

"THE COURT: You may.

"MR. McLEOD: And a continuing motion to exclude this witness's testimony?"

"THE COURT: You may. Continue.

VAN CLEVE, Direct

(R.S. 1138)

"MR. CONIFF: Thank you.

By Mr. Coniff:

"Q. Dr. Van Cleve, I don't mean anything personally, but I feel that we are on a technical basis here at this point.

"A. You are perfectly at liberty, sir, to ask any questions you wish.

"Q. Now, Doctor, I believe you have testified then that you have reviewed the data which would show that the—

"MR. McLEOD: I will object to the publication, your Honor, and to Counsel leading this witness, and telling him what to testify to. I will move that the question be stricken.

"THE COURT: Objection will be overruled.

By Mr. Coniff:

"Q. Am I correct in stating, Doctor, that you have testified that you have reviewed the data relating to the fishery population of the Puyallup River system?

"A. That is correct.

"MR. McLEOD: I will renew my objection.

"THE COURT: It will be overruled.

"Q. Now, again, Doctor, I will ask you, do you have an opinion regarding the effect of the Indian net fishery upon the anadromous fish population of the Puyallup River system, and answer yes or no.

"A. Yes.

"Q. Would you please tell us what your opinion is?

"A. Can I diverge a little bit with this answer and give

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(R.S. 1139)

you some basis for my opinion?

"Q. I wish you would.

"A. The basis—this probably will be a little bit lengthy, but to give the background for my judgment in this case it goes back to the, first to the structure of the salmon populations and their habits, and in the migratory return from the ocean, and the relationship between the escapement of the adult salmon, and the amount of salmon, the number of salmon that are produced.

"Taking things up in what I hope to be a logical order, in the first place the salmon populations have been found to consist of numbers of independent units. We call them races.

"These units, these independent units usually inhabit either independent streams, small streams, and in the case of the fairly large streams you have independent units that occupy portions of those streams.

"The evidence of this is legend. The legend—one of the best examples that I could cite was the investigation of, well, the records of what happened up on the *Burtonhead* River in Canada, near Harrison Lake. As a result of some of the early hatchery operations that required the collecting of adult sockeye salmon, to spawn them and put the eggs in the hatcheries, this was an attempt to rehabilitate upriver streams that had been depleted through the rock slide at Hell's Gate.

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(R.S. 1140)

"The first weir was put not far from the upper end of the spawning area, and within a few years no more fish came up to this weir. So it was impossible for the hatchery people to catch your Sockeye salmon.

"For example, some species moved the weir downstream. The same thing happened again until the, finally when, or in the early 1930's when the

hatchery, salmon hatcheries were eliminated in *Brich*, B.C., the weir location was about a mile above the mouth of the *Burtonhead* River, and the runs above this area had been eliminated.

"But even in 1946 when I took over the direction of the biological work for this Commission the run was still confined pretty much to this lower area. And they had not recovered the runs above the location of the weir, and had not recovered—and they did not recover for another eight to ten years.

"Well, about two cycles of—it was after the closure, after the regulations of the fisheries that was inaugurated that migration began and increased the escapement, and increased the pressure in this area in the lower region.

"Then it built up this, and it indicated that in separate parts of that one river you had separate and distinct self-perpetrating races of fish that were very difficult to rehabilitate.

"This has been further indicated—I refer again

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(R.S. 1141)

again to the Fraser River because this is where the most work has been done, the most meticulous work has been done in these races.

"In our attempt to rehabilitate some of the streams, we transplanted fish from the other streams that were closely associated with these in the type of character of the stream, the temperature cycle and the weather cycle, the stream flow, and in the nature of and the length of this distance from the ocean.

"And we would take from the, one stream, and put the eggs into the other stream, and in some of these we have not yet, even though many attempts have been made since then to, since 1948 when I left the fishery, to establish runs in these new streams, they have not been able to establish them because of some difference between them that is not yet understood, between the two races.

"So the races to these two streams are quite individual.

"Now, this means that in developing a program for escapement, it is necessary to provide escapement from each race, and it isn't a matter of just providing a chunk of fish from any part of each run.

"It is necessary to understand, in a fair amount of detail, that is, if you are going to have a really efficient management program, the method of, or the manner in which these fish approach the river,

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(R.S. 1142)

and move upstream.

"This is the characteristic of most species, in fact, all of the species, that the fish in different races will normally arrive at different times.

"In these latitudes the time at which a particular race may appear at the mouth of a stream and migrate up is likely to be, occur over a considerable length of time.

"We have a different situation in the Bristol Bay area. I am concerned with this because we have the Fisheries Research Institute as part of the College of Fisheries under my direction, and that is under my administration, and periodically I visit the Bristol Bay area and observe the, our rather complex biological program.

"This is a cooperative program with the State of Alaska, Fish and Wildlife Service, and International North Pacific Commission.

"Here you have the races, a very complex situation where the races appear at the mouth of the river in a very brief period of time, so that you have a different management program problem, but it is just one of the technicalities.

"But anyway, each one of these races has to be managed independently, and as independently as possible. And the escapement has to be very delicately balanced to allow escapement of all parts of

each race, because each race consists of a, what we call in genetics, a gene pool, which is actually

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(R.S. 1143)

the basis for the genetic inheritance of a particular race or particular population.

"Within this pool is expressed the, some of all the variabilities of this particular race.

"And in this variability is an important group of factors which permit the particular population to adjust itself to the changes in environment that normally occur and the success with which a population adjusts itself to the changes.

"The variability of these environments is a measure of the variability in the gene pool.

"Now, if you take, and if you cut out a particular section of a race, you are cutting out a particular variability of this race.

"Now, of course, you have the tendency of the population to, even within each segment, to vary to a certain degree, and of the group itself to maintain the identity of this particular stock or population, but the fact nevertheless remains that the essential factor in management is the provision of a portion for escapement from all parts of this particular, of each particular race.

"And for this reason it is extremely difficult to provide adequate and intelligent management in a fishery which is not managed in a manner to permit the escapement of all parts of these races.

"A good example of what can happen in a case of this kind was a situation that I observed in

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(R.S. 1144)

the headwaters of the Fraser and again up over the Driftwood River. This is the headwaters of the Stewart system and approaches the coast range to the north, and east of Prince Rupert, and this is—let's see, the Driftwood River, that runs into Pakla Lake. There is a large chain of lakes that

was extremely; or was in the past extremely productive of salmon.

"In 1947 I was looking over the situation with a view to attempting to rehabilitate the Sockeye runs in the Driftwood River. We had reports of this river and the biologist that was in charge of this area had reported to me that it was an excellent stream. And so we flew to the headwaters of this stream, and came down so that we were able to walk to it, and so I was able to see it in the—well, it was in August, at its best, and at the time when the Sockeye were supposed to have been coming in here.

"And this was the early run of the Stewart before it came up, formerly came up the Stewart, that is.

"And at the time that I came here, I met a very interesting person by the name of Bear Lake Charlie. And Bear Lake Charlie I first encountered in the text of the book called *Driftwood Valley*. It was a very interesting book about some people that went up and lived in this very primitive area away off from the end of civilization for about five

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(R.S. 1145)

years, and Bear Lake Charlie was one of the principal characters in this book, so I was extremely interested to meet this old boy.

"And we met him on the river going down. We met him at the, when we first landed, and he introduced himself and his family and his son, and so we asked him what he was going to do.

"He said he was going to hunt wolves. He called them "wooves." But then we encountered him again when we came into some of the places there, and they were some of the finest—we were looking for areas or looking at areas that would have been excellent spawning areas in the Driftwood River there, and here was a net stretched across the river. And we were just out there looking at the net, and preparatory to hauling our canoe in and all of the

gear around it, and when, or then Bear Lake Charlie and his son appeared, and he apologized profusely for the poor net because he said it wasn't a very good one, it left three feet of gap on one end.

"And he said, 'You can come back next year,' he said, 'and I will have a good net then, stretch it right from bank to bank; no salmon get through.'"

"I don't think that this, that his net would have been very good because in the entire course of this river—it took several days to drift down—we didn't see a single run of Sockeye. There were literally millions of the *Cochineal*, the landlocked

VAN CLEVE, Direct

(R.S. 1146)

form of these fish, but the heavy fishery on this river had really taken every Sockeye out.

"And this is what happens when you have situations of the populations that have to be adjusted, properly adjusted to reproducing itself under rather difficult conditions as you have in these high latitudes.

"Q. Do you know of any other Indian fishery other than the one you have just described?

"A. Yes. We had the—I first encountered an Indian fishery in the Trinity River in California.

"Q. This was—

"A. This was right at the base of Eureka on the Trinity River that goes from Eureka into Redding, and in this river there is a very interesting fishery on the Trinity River runs—which, incidentally, is limited for many reasons—and for many reasons I included this fishery, or set it as a very low, at a very low level, but the Indian fishery there was a brush weir which was right across the Trinity River.

"They had platforms on this weir from which they dipped fish. And unfortunately, the weir was put in, of course, before the fish came up, but the Indians for some reason or other never took it out. It was left in there.

"After they had taken the fish that they wanted the weir was left in there, preventing the access of fish to the upper stream, from which the fish were locked out.

VAN CLEVE, Direct

(R.S. 1147)

"Another very interesting fishery was at *Salala* Falls. Here again the effects of this were measured by the escapement at, over the John Day dam, or over the—I mean the McNary Dam before and after the construction. I had occasion to observe this fishery a number of times. And some of our students were working on the fishery for the State.

"I have also had occasion to study this fishery. Since last year I was, or I have been consultant for the Army Engineers on the problems connected with the, the fishery problems connected with the John Day dam which is between The Dalles dam and McNary, and when this, when The Dalles dam was closed and the water flooded, this fishery was—I think that was 1957, the escapement of fish over McNary dam, the fall run of Chinook, which is the time that the Indian fishery was particularly effective, increased from four to six times, and it made that much difference in the escapement of the fall run.

"Other Indian fisheries, of course, aside from the Fraser River, I have seen fishing in the Yakima at the Yakima dam, and this, according to the records that have been put in evidence, is that it is extremely effective there too.

"Q. Do you know, Doctor, if the Indians have ever—well, let me put it this way: Has any group of

VAN CLEVE, Direct

(R.S. 1148)

Indians ever come and consulted with you, or asked any member of your staff, or ever come to you and asked you how to set up any type of regulation for these fisheries?

"A. Yes. Mr.—Oh, heavens, I can't remember the name now, but there was—the Makah Indians and sev-

eral other tribes, the Tulalip Indians, worked, or asked me, asked us at various times to help them set up regulations, but things never got around to developing because they couldn't agree among themselves as to how this should be done, or whether it should be done, so we have never been able to, this has never come to anything. But we have always indicated our willingness, although being a body of people which is operated under a state budget which supports us entirely for teaching, we are unable to spend money, we have no money to spend in travel around and in putting students on the study of the kind, the kind of studies that would be necessary to develop a management program.

"Apparently the Indians have been able to get money. We haven't been able to get money ourselves though.

"Q. Now, Doctor, in your opinion, what is the—well, let's put it this way: What would be a proper management—what are the management goals, would you consider to be the proper management goals of the state agencies of the Department of Fisheries?

"A. Well, the state agencies are the responsible agencies—the agencies responsible for conservation of

VAN CLEVE, Direct

(R.S. 1149

the fish, and "conservation" does not mean saving these fish to, that is, preventing the capture of these fish. It means the development of the runs, and speaking particularly with respect to salmon. But it also holds true with respect to all other species too.

"They obtain the maximum catch, that is, the population that each population is capable of producing, and this is the, means that we should have maximum utilization of all the facilities and all the spawning areas of the salmon.

MR. CONIFF: Thank you, Doctor. Your witness.

(R.S. 121)

DR. DONALDSON'S TESTIMONY

(R.S. 121, 132, 144)

about here, in general terms, implies that there would be adequate numbers of fish go to these spawning grounds to maintain their run.

"I didn't necessarily say when they would be taken or how they would be taken, but just that we have to have that many fish to keep the run going.

"Q. Would it be fair to say, then, that from your standpoint, as an eminent fish conservation expert, that you must have a certain level of return, and you don't particularly care how you get it, as long as it comes back?

"That is not a loaded question, but you just want the fish, you want the end product, and you want that many fish arriving upstream?

"A. You have to have enough brood stock in the case of salmon. I think my testimony has introduced this rather vividly, to maintain the runs at a productive level.

"Q. But if you fall below that level, it doesn't make any particular difference to you, does it, sir, whether the fish have failed to arrive because they were killed by pollution, whether they failed to arrive because they were killed by, they were killed out in the ocean by Japanese fishing, whether they were caught in the Puget Sound, or where they were caught, as long as they didn't get through; is that correct?

"A. The fish is dead one way or the other.

DONALDSON, Cross

(R.S. 132)

"A. Well, again, I think my comments have been quite obvious in this case. We would only take them once. Where would—do we take them? We take them in the fishery, the over-all fisheries, or do we take them in the special fisheries? I think I have commented on this matter that it would be most difficult or impossible to operate—

"Q. Well, would it be a fair statement, now that you have said 100 per cent of those salmon which enter the Puyallup River should arrive on the spawning grounds, is that a fair summarization?

"A. Right.

"Q. All right. Does this mean that all of the catch of the salmon, and all of the taking out of it, from your viewpoint of proper and adequate conservation, should be taken during the time that the salmon progresses through Puget Sound and down to Commencement Bay?

"A. I didn't testify to that.

"Q. No, what I am trying to find out is where, from the conservation standpoint, do you believe the catch should be made?

"A. Well, it doesn't make any difference where it is made, actually, as long as you have—you must maintain adequate escapement for spawning. It doesn't make any difference where you take the fish. It doesn't make any difference whether you take them at Port Ludlow or the Straits of Juan de Fuca, or out in Neah Bay.

DONALDSON, Cross

(R.S. 144)

. . .

"Q. Now, —

"A. (Continuing) That enters into the adequate escapement for maintaining the run.

"Q. Well, would it change your opinion if I were to tell you that in 1956 that the sportsmen took 18,500 steelhead behind this Indian fishery, that is 18,500 steelhead behind the Indian fishery of the Puyallup; would that surprise you to know that?

"A. I know that.

"Q. Well, now, in effect, did you know that the Indian took less than 1500 fish that same year?

"A. There are other ramifications that—

"Q. Well, Doctor, I am asking you.

"A. You are asking me?

"Q. Yes, I am asking you: did you know that?

"A. Yes, I knew that. There are other ramifications also.

"Q. Do you think it is fair for you in charge of management to say that the Indians go out, and the sportsmen can continue to take 18,500 fish, and the Indians only 1500?

"MR. CONIFF: Objection, your Honor.

"THE COURT: Objection sustained.

"MR. MCLEOD: Your Honor, I think that—

"THE COURT: You asked him a question that is argumentative, and is not fair. Objection sustained.

DONALDSON, Cross

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(R.S. 210)

OFFICER WAYLAND
(R.S. 210, 263, 281)

"Q. Of your own knowledge, isn't it correct that the Indians of that area who drift net, or conduct drift net fishing, do so primarily only at the time when the tides are changing?

"A. I am a little vague on that because I am not a fisherman with a net. I assume that, yes, the tide has got something to do with it.

"Q. This would leave several hours between times when they could fish, is that correct?

"A. That is true.

"Q. It takes some time, based on your observation, to take the drift nets, and get back upriver with it after you have finished drifting to the point where you are going to stop?

"A. Yes.

"Q. So you didn't mean to convey the impression that the Indians have a permanent barrier across that point, and were taking everything that came up the river?

"A. I wouldn't say they were taking everything; however, when they are drift netting, the set nets are still in there. Drift netting would be in addition.

"Q. This is not a permanent barrier stretched across from bank to bank, and top to bottom; it's something far different, based on your own observation?

"A. My own observation, it would be while the net is in the water.

"Q. That is right, but it is not permanently there?

"A. It isn't.

WAYLAND, Cross

. . .

(R.S. 263)

"Q. Do you know what effect, if any, these log booms have on the set nets in the river that you have indicated?

"A. If I might explain, I know of several times it has affected them.

"Q. In what way?

"A. One, as a matter of record, which I believe is in this courthouse, of a tugboat taking out a portion of nets in the river, and a suit filed against the Tugboat Company.

"Q. How many nets were taken out, if you know?

"A. I am just going by memory. As I recall, 300 foot of nets at \$300, and \$100 a day for the net, or 300 feet of net, which had not caught fish for one week, or I believe it was a suit for a thousand dollars.

"Q. How long were these nets out of the river as a result of this?

"A. I don't know, sir. I believe this happened prior to my being stationed in this area.

"Q. Do you know of any other incidents where a log or log boom have taken out these nets?

"A. I have talked with Jack Moses, and Junior Saticum, and they have told me at times they have removed logs from the river without prior notice to them, and they have lost nets in this manner.

WAYLAND, Cross

. . .

(R.S. 281)

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"Q. Officer Wayland, I believe you testified this diagram you prepared is not to scale; is that correct?

"A. That is right.

"Q. That it is, to the best of your ability, a portrayal of the conditions on the river, the geography and so on?

"A. With the exception of the upper panels which are highway maps, and they are, I would say, to scale.

"Q. Now, I believe you have also testified that the net locations that you have drawn on here at the various points are more or less a compilation of your total experience with the river, the total observation you have made?

"A. Yes.

"Q. In addition to any of the net locations which are shown, or depicted here by—your marks are on the map—but have you ever observed any other nets in any other locations in addition to those net locations shown on that map?

"A. Just one.

• • •

(R.S. 544)

OFFICER SARDANOV

(R.S. 544, 554)

• • •

"Q. Are you able to tell us the number of catch that they would make out there? I appreciate that you wouldn't know the number of fish, and that type of thing, but—

"A. It just depends on if the fish are running. I have fished with a purse seiner with three different nets, three different net settings, and didn't even catch one fish.

"Q. What is the largest catch?

"A. The largest catch that I made was up to 2500 or 3,000.

"Q. How long does it take to run this entire operation,

from the commencement, to get the net out of the water?

"A. (No response.)

"Q. You have brought the net back and put it into the boat, and got the fish, and then you are ready to make another run; how long does it take?

"A. That is done in about three hours.

"Q. So you can run two or three of them in a day, couldn't you?

"A. Just about. You could run two or three.

"Q. Is it determined on whether or not you have a hot spot, as far as fishing is concerned?

"A. You don't know. You don't know until you have an opportunity to set the net.

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(R.S. 554)

• • •

"Q. How many feet north of that projected line is it from Brown's Point then?

"A. It's on the northwest.

"Q. It's on the border, or—

"A. Northwest of Brown's Point.

"Q. So we are talking about Brown's Point where the commercial fishing—

"A. North of that.

"Q. Just north of it, but on Brown's Point—we are not talking about something a mile north of it, or—

"A. Just from where the light is on Brown's Point, north of that line.

"Q. That would be a few feet north of that light?

"A. (Nods head affirmatively.)

"Q. The whole area?

• • •

(R.S. 593)

GEORGE SMALLWOOD'S TESTIMONY
(R.S.P. 593, 596, 597)

. . .

"Q. Now, I will ask you to examine Plaintiffs' Exhibit No. 26, the markings that appear thereon, at the mouth of the Puyallup River, and ask you if that to you is an accurate representation of the complex of nets which you yourself have personally observed in your patrols of the river?

"A. I have observed similar accuracies—or, I mean, similar pieces of netting in the river.

"Looking at it, it appears that, to me, that it crossed about, about halfway across the river at the mouth.

"Q. Now, I believe the exhibit would speak for itself.

"A. Yes.

. . .

(R.S. 596)

. . .

"Q. All right. Thank you:

"Officer Smallwood; do you mean to indicate that the complex of nets that are at the mouth of the river—let me accurately state the question.

"Do you mean to indicate that the nets which you have actually observed have the same length of, as those nets depicted on the exhibit would have if they were drawn to scale?

"A. No, sir.

"Q. You never saw a 900-yard net out there, did you?

"A. No, sir. According to, looking to the map there, I am trying to be as honest as absolutely possible,

SMALLWOOD, Cross

(R.S. 597)

I never saw a net that would cover halfway across the river, about, or quite halfway across the river.

. . .

(R.S. 670)

J. E. LASTER TESTIMONY

(R. S. 670, 672, 673, 809, 815, 832, 833, 849, 850, 855, 861, 862, 865)

"MR. CONIFF: Well, your Honor, I could take it point by point if you so desire.

"THE COURT: Well, I think the point is well taken, based upon the fact that the diagrams as made by the witness on the map are certainly not to scale, and I do think that you have added some points here that are not sustained by the evidence yet, at least.

"For example, your use of the words of virtually sweeping the river free of fish, I don't find any evi- to that effect; yet, anyway.

"I am going to allow you to reconstruct your hypothetical question, and I am going to take a recess at this time.

"I would like to ask Counsel to meet me in Cham- bers, please.

LASATER, Direct

(R.S. 672)

you have not filled the spawning grounds. You are working two important things at the same time if you do otherwise.

"Q. In other words, these other mortality factors in the total life cycle of our fish stocks, and salmon stocks, are adjusted, so to speak, by the setting of the, by the regulations concerning the harvest of these fish?

"A. Two things; you try to correct the cause, and if you can't correct the cause, then you allow for its effect.

"MR. McLEOD: What was the last statement?

"THE WITNESS: If you do two things in the mortal- ity problems, you try to correct the cause.

"MR. McLEOD: Yes, but what was that last state- ment that you made?

"THE WITNESS: If you can't correct the cause, then you must allow for its effect.

"Q. Now, directing your attention to the Commencement Bay area, and the Puyallup River, I believe there has been testimony that there is an area that is closed to commercial fishing; what about sports fishing for salmon?

"A. Sports fishing is allowed in the bay.

"One thing that has become quite well known with the sports fishery, and that is, especially after the fish have finished their migration through the sound and they are milling near the river mouth and maturing, they cease feeding and they don't strike very well, so the hook and line fishery will take but a small percentage of the available stock

LASATER, Direct by Coniff

(R.S. 673)

no matter how hard they fish.

"And the river itself, we had a sports fishery on the river in past years, limited in area, and then further limited in time, and then as our dissatisfaction with spawning escapements increased, at our last regulation hearing we closed the Puyallup River to all sports fishery for salmon, except for what we call "jacks". And the jacks are the precocious males that contribute very little to the spawning ground. There are no female jacks, and they can be differentiated by size since they are much longer than the other fish.

"Q. Perhaps you should explain at this point, what is a jack salmon, and whether it is a two-year fish, three-year fish, or what?

"A. It depends on the specie. "Jack" can refer to any specie. It is a salmon that matures a year prior to normal. For instance, fall Chinook normally mature as two, three and four-year old fish. The jacks mature as two-year-old fish, and they are almost 100 per cent males. So they are small males because they are younger.

"A silver salmon matures almost entirely at three years of age. Jack silvers are two years of age. And these jack silvers are usually around, oh, twelve to eighteen inches long, maximum weight

probably four and a half pounds, where the three-year-old fish largely run from five to twenty pounds.

LASATER, Direct by Coniff

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(R.S. 809)

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"Q. All right, what is the next fishery that they will encounter, that a returning migrant will encounter?

"A. Enter Strait of Juan de Fuca on the south side, and then on through Puget Sound, starting at Discovery Bay.

"Q. All right, Discovery Bay to where?

"A. There is a continuous fishery through to, under State regulations, Brown's Point at the mouth of Commencement Bay, continuous fishing water where chums are available.

"Q. Would it be accurate then to say Discovery Bay to Brown's Point, continuous fishing water?

"A. Yes. There are poorer and better grounds all the way, but the fishery is continuous, in—

"Q. Now, what—

"A. I was just going to add, in area.

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(R.S. 815)

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"Q. So, based upon that, for the fishing which takes place nearer to Discovery Bay than to Brown's Point, is there any way of establishing how many of the fish which are taken out at that point would have gone to the Puyallup River rather than to, oh, the Deschutes, or some other river which empties into the sound?

"A. In some cases and to some degree, yes.

"Q. Well, in what cases and to what degree?

"A. Oh, there has been tagging, for instance, in the outer Strait, and from this we can have an idea

of the exploitation rates on the Puyallup stock, their timing through the fishery, the effectiveness of the fishery on them at various points.

"Q. So can you then establish a rough working hypothesis as to the effect of the fishing or the fishery near Discovery Bay up on the Puyallup run itself?

"A. I would say yes.

LASATER, Cross

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(R.S. 832)

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"Q. Now, this would raise at least the possibility, would it not, sir, that there was a factor outside the Puyallup watershed itself which contributed to, or caused that decline?

"A. We are confusing brood years here. 1960 was the very bad year. 1963 was the result of progeny from a very poor over-all decline in 1960.

"The run is up considerably by brood year 1963 over the parent stock. You see, you are comparing one parent stock with another.

LASATER, Cross

(R.S. 833)

"Q. (By Mr. Cone) Well, all right, the sentence that I read is actually a comparison of one year?

"A. One year.

"Q. One calendar year with the next previous?

"A. (Nods head) We apparently had a poor brood year in 1960.

"Q. There appears, or does that appear—do you know whether that was an across-the-board low year?

"A. It was.

"Q. Well, would that low year in 1960, and the fact this was an across-the-board low year, would that raise in your mind the possibility of the existence of a factor outside of the Puyallup River watershed itself?

"A. Yes, it does. We had to put in emergency closures that year to get a sufficient spawning stock on the grounds.

"Q. Well, and the run was very poor that year, wasn't it?

"A. The run was poor in 1960.

"Q. It was poor on silver salmon across the board, wasn't it?

"A. Yes.

"Q. Well, the poorness of that run, the fact that it was poor across the board, would raise in your mind, would it not, sir, the possibility or probability of a mortality factor which existed just outside the Puyallup River watershed?

"A. Yes.

LASATER, Cross

. . .

(R.S. 849)

"Q. Could you give me an approximation as to whether, as to how the catch by the sport fishery of, I think the word you used was 'resident'?

"A. Yes.

"Q. (Continuing)—silver salmon in the salt water phase, and in Puget Sound, compares with the catch taken by the Indian net fishery on the Puyallup River?

"A. I believe there are some figures, if I may refer to that.

"Q. If you would, please.

"A. I am sorry, but it isn't split by resident and ocean fish migrating through here. I think that material would be back in the office.

"Q. I see.

"A. This is the total Puget Sound silver catch, and I wasn't thinking—it is not split as to whether the fish are resident or otherwise.

"Q. Would this be the total sport catch that you are referring to now?

"A. Of silver salmon.

"Q. I take it you are referring to the 1963 figure; is that correct?

"A. I have it from 1949 through 1963, sport catches of silver salmon, Puget Sound.

"Q. Would you give us the 1963 figure as opposed to the silver salmon catch by the—would you give us that, and then give us the Puyallup River net fishery catch for that year also for silvers?

"A. Of course, the Puget Sound catch comes from all
LASATER, Cross

(R.S. 850)

Puget Sound streams, and the Puyallup catch here is strictly from one river. 1963, Puyallup Indian catch of silver salmon, 13,461.

"1963 catch of silver salmon in the sport fishery, from the total of the Puget Sound, 120,900.

"Q. Now, would there be any way—I realize that perhaps you don't have the date with you today, but would there be any way of determining approximations of the proportion of the sport catch in the Puget Sound which would have been Puyallup River spawning fish?

"A. I believe it could be, an approximation could be calculated.

"Q. And I take it this was a portion of the data which you indicated yesterday which had not been finally—it was available, or it would take a great deal of computation to put it into final form; is that correct?

"A. There is a lot of data that would have to be put together in a particular way, and the proper statistical mathematics applied to make such an approximation.

LASATER, Cross

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(R.S. 855)

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"A. Yes, an approximation.

"Q. Highest allowable mortality.

"So as a completely hypothetical approximation we could say that for instance if we increase—if we add into the total picture we are talking about, say, a two per cent mortality from sports fishing, then in order to preserve this run, that

two per cent has got to come out in the form of a diminishment of some other mortality factor, or you are going to lose the entire run—am I correct in that?

"A. Yes.

LASATER, Cross

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(R.S. 861)

"Q. And, the Chinook, with the Chinook would you say once more that there should be no mortality factor allowable at all from Commencement Bay upstream except for a sport fishery?

"A. Yes. The reason I hesitate, I am thinking of the type of gear and fishery that I know about in this area, and the milling pattern of the fish, and how they behave.

"Q. And in what way would that affect the—

"A. Well, see, we have a sport fishery there.

"Q. You have a sport fishery in Commencement Bay, is that correct?

"A. That is right.

"Q. Do you have any sport fishery upstream on the Puyallup for Chinook?

"A. Not now. We closed it.

"Q. And with the Chinooks, would your answer be the same as it had been with the silvers and the pinks, that the proportion of the Puyallup River run taken by sport fishery or by commercial fishery, as opposed to the Indian net catch is something that you believe is calculated but you are not in possession of that data at this time?

"A. That is true.

"Q. Would it be accurate to say then that in your regulation you have not found it necessary to work with any comparison of the proportion of the run which is taken by Puget Sound commercial fishermen as opposed to the Indian net fishery on the Puyallup River?

LASATER, Cross

(R.S. 862)

"A. For the particular river, no.

"Q. And, sir, would I be accurate in saying that this is because you have determined from a conservation standpoint that the 99 per cent mortality must or should occur prior to entry into this Indian fishery?

"A. Yes.

LASATER, Cross

. . .

(R.S. 865)

By Mr. Cone:

"Q. All right. But dealing with the stretch of water which I have just indicated, to wit, Commencement Bay and so much of the Puyallup River as extends upstream to the town of Puyallup, would it be accurate to state that regulation of fishing in that area, from your standpoint as a conservationist, essentially means a prohibition of all non-sport fishing for the four types of salmon which we have just discussed?

"A. Yes, that is correct.

"Q. We have discussed, sir, with each fish, a series of mortality factors.

"Now, as a, just as a starting point, would it be correct to say that there are some of these mortality factors which can be regulated by your department, and there are some which are beyond regulation?

"A. That is correct.

"Q. All right. Now, would you indicate for us the mortality factors that we have discussed, those which are subject to regulation by your Department?

"And by 'regulation,' I don't mean, in a technical sense, that you pass laws; I mean within your power to—

"A. To control?

"Q. —to control?

"A. To some extent, at least,
LASATER, Cross

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(R.S. 1062)

JAMES ARTHUR HAMILTON TESTIMONY
(R.S. P. 1062, 1063, 1071)

• • •

"A. Theoretically, yes. There are many cases where it can be done, because there's overlapping of runs coming through at the same time. Voight Creek, Kelly Creek, Clear Creek, any Cohoe or Silvers coming through at the same time, it would have to be considered as a unit because you can't separate them.

"Q. Now, going back to your hypothetical, if we have ten thousand fish, and we need a 1,000 fish escapement—

"A. Yes.

"Q. (Continuing)—you are not telling us, are you, sir, in this particular situation, our actual situation here, that from the conservation standpoint it is necessary that all 9,000, which we are going to allow to be caught, be caught by any particular person at any particular place?

"A. No.

"Q. So, would it be correct to say, then, the allocation of that nine thousand, the proper nine thousand harvest, to a particular group of people at a particular place is essentially a non-conservation matter?

"A. That is, I have always considered a social affair, if I can put it that way, if you grasp what I mean

HAMILTON, Cross

(R.S. 1063)

by a social affair, or a political affair.

"Q. I certainly do.

"A. As the Fraser River, the allocation of the Fraser River catch was not a problem of the fishery

biologists or the research team that was set up by treaty to study the thing, it was already given to them, and that was determined, I am sure, politically and determined sociologically, you might say.

HAMILTON, Cross

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(R.S. 1071)

"Q. In other words, you might theoretically at least with our watershed provide for an escapement of theoretically 1,000 fish, but rather than balancing it out among the various spawning grounds, you might end up with 1,000 fish which go to the Puyallup and Voight's Creek and Carbon River fishing ground and no fish which are left to go to the White River spawning ground, is that correct?

"A. If they are migrating at the same time, I don't think that would be necessarily correct, but if there were distinct entrance times, I think probably so.

"Q. So going back to my harvesting analogy, if I were to alter it and say that if you left the milling area untouched, the area in which they mill, but moved your fishery to the mouth of the river, where they break off and start coming up the river, that from a pure harvesting standpoint it would be correct to say then that given the state of the art in which we cannot identify with precision the races of the fish when they are out in Puget Sound that the optimum place to harvest would be in the mouth of the river?

"A. Providing, of course, that it was strictly regulated, I am inclined to think that would be true.

"Q. Thank you.

"MR. CONE: I don't believe I have any further questions, Doctor.

HAMILTON, Cross

(R.S. 1120)

MR. MILLENBACH'S TESTIMONY
(R.S. 1120)

"A. Yes, subject to checking on the part of our game law enforcement officers.

"Q. And they are subject to the individual reliability of each fisherman to accurately state the extent of the catch, isn't that right?

"A. They are the ones that record on the punch card the data, and I think this is correct.

"Q. It is sort of an honor system?"

"A. Yes.

"Q. Is that correct?

"A. With checks, if you will.

"Q. Now, the '55-'56 season you indicate in the Puyallup River the sportsmen took 18,496 fish, is that correct?

"A. Yes.

"Q. And the Indians took 1,200?

"A. But this is the extent of the information we have on the Indian catch.

"Q. Yes. Then in 1952, the Indians took 104 and the sportsmen took 14,190?

"A. This is to the best of our records, yes.

"MR. McLEOD: Your Honor, I would like to renew at this time my motion to strike on the grounds previously state concerning this witness's testimony.

"THE COURT: The motion will be noted; the same will be denied.

. . .

(R.S. 1268)

DR. TAYLOR'S TESTIMONY
(R.S. 1268)

. . .

"A. Before the coming of the horse—and I am sorry to have to keep referring to the coming of the horse, because there was no time than this at which the horse got so influential and had as serious an effect on the way of life of the majority that would

have occurred later, but it was interpreted that the first affairs of the white man and the virtual destruction of the Indian population by disease occurred before the introduction of the horse. The ecological adjustment was almost entirely marine and river oriented.

"As we go back in time, or if you go back a thousand years in the anthropological cycles, you can see heavy land mammal hunting. Some of this continued in the Puyallup in common with the other sources of personal kill. They killed some deer; they killed some bear, but overwhelmingly they have been dependent on the sea and the river.

"The single most important food item, based upon the anthropological records, was not fish but clams.

"The second most important, and a very important second item, was fish, primarily salmon, but many other fish as well.

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(R.S. 1283)

DR. TAYLOR'S TESTIMONY

(R.S. 1283, 1284)

• • •

"Q. Now, Doctor, returning again to this term "usual and accustomed grounds," do you have any—can you give us your impressions, based on your research in this area of how or what meaning or significance this term would have to the Indians, or for that matter, on the part of the federal representatives or negotiators who were charged with the responsibility of framing the Treaty of Medicine Creek?

"A. Prior to the coming of the white man, sir, each tribe understood pretty well what its major fishing

TAYLOR, Direct

(R.S. 1284)

and clamming grounds were. It was a very rare thing that violence occurred that would be intra-tribal or even intravillage.

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(R.S. 1288)

DR. TAYLOR'S TESTIMONY
(R.S. 1288)

. . .

"A. I can give you a general description that I had in mind.

"Q. If you would, please do so, Doctor.

"A. A wide variety of fishing techniques were employed. Upriver systems, the fish will be speared. Fish weirs would be built, and fish traps would be built.

TAYLOR, Direct

(R.S. 1509)

DR. TAYLOR'S TESTIMONY
(R.S. 1509, 1510)

. . .

"Q. Going back to the pre-treaty time, and I hope to wrap this up rapidly, would it be true to say the people of the Puyallup River habitually—strike the word habitually—have fished at night?

"A. They fished at night.

"Q. They used to fish at night, didn't they, because, to make the tackle fish easier?

"A. There is trouble with the word "often" but it was not unusual.

"Q. All right. They fished, am I correct, with spears?

"A. Yes, sir.

"Q. They fished with nets?

TAYLOR, Cross

(R.S. 1510)

"A. Yes, sir.

"Q. Did they fish with artificial platforms or barriers embedded, which impeded the migration of the salmon where they would scoop them out of the water?

"A. Yes, although in the larger streams they could not completely block the stream, and in smaller streams they would put barriers that for periods would completely block it.

. . .

(R.S. 1320)

DR. TAYLOR'S TESTIMONY
(R.S. 1320, 1321)

* * *

"A. I have two additional things that—

"Q. Please go ahead, sir.

"A. — I would like to make.

"The minutes also contain the following comments: (Pause.) At the moment I can't find them in here, but I am quoting directly from those notes of mine.

"It was also thought necessary to allow them to fish at all accustomed places, since this could not interfere in any manner with the rights of citizens, and was necessary for the Indians to obtain subsistence.

"Q. And you had indicated, I believe, sir, that there were third party comments or—

"A. Yes, sir. I should say that there is a third comment which is contained in the Treaty itself. There is a clause in the Treaty which says that they will be allowed to fish at all of their accustomed fishing places, in common with the other citizens of the Territory.

"Q. Now, do we know, sir, whether or not the, in the TAYLOR, Cross

(R.S. 1321)

proposals, the actual oral proposals made by Governor Stevens during the treaty rounds, whether or not in his English proposals, that is, the proposals in this English language he used the phrase which appears in the treaty, which was actually ratified, in common with the other citizens of the territory?"

"A. We don't know. My best guess, if you wish a guess, is that he told them that they would be allowed to continue fishing where they had fished before.

"Q. Are we able, historically, based upon your knowledge or studies, to account for the differences between the actual Medicine Creek Treaty and the

draft to which I initially referred you here, which used the phrase, 'all common and accustomed places,' I believe?

"Let me be accurate on that.

(Brief pause.)

"Fishing at all common and accustomed places, and further secure to them . . . ' and it makes no mention of 'in common with the other citizens of the Territory.

"Can we account for this change?

"A. Well, in the first place, there is a, we have these missing minutes. We don't know how long the minutes were missing. We have Meeker's word for it that when, what he wrote in 1905, he writes about the minutes, and he quotes the letter, and this is a sense a reply, in his book, that he was told that, 'Unlike all of the other treaties conducted by

TAYLOR, Cross

(R.S. 1347)

TESTIMONY OF DR. TAYLOR
(R.S. 1347, 1348)

. . .

"Q. At the time of the treaty in 1854, and you went up on the Puget Sound area here, was this, insofar as you know, were there commercial fishing vessels operating in the Sound?

"A. Not as far as I know. There are some interesting discussions on it. For instance, there is a reference to state land for shellfish which implies that commerciality had begun to appear. But if it were present it must have been present in an infantile form. And the very remark that, of course they should be allowed to fish at their accustomed fishing places, because it would not interfere with the rights of the other citizens, and this indicates that no one had any perception of the enormous commercial importance of the fish.

"Q. Do your resources or studies, sir, indicate to you whether or not the Puyallup Indians took fish solely for their own food?

"A. Yes, it does indicate that they did not take them solely for their own food.

"Q. What, other than needing the fish for themselves, did they do with them?

"A. They smoked—

"Q. Other than eating fish themselves?

"A. They would gather fish and certain other marine
TAYLOR, Cross

(R.S. 1348)

produce, which were clams primarily, and the clams were more important because they smoked clams. They smoked salmon also, very strongly, and then traded them down to the Columbia, on the *Baitish* on the Cowlitz. Or they would take them over the mountain trails directly into the interior in turn for a number of commodities that they couldn't readily get themselves.

"Flint being before the coming of the white man, and that was one of the commodities, that trade seems to have died off rather rapidly after the coming of the Hudson Bay Company because of, of course, iron, steel, gunpowder, which became much more important commodities than flint.

"Q. What, if you know, did the Puyallup Indian Tribe trade with Hudson Bay?

"A. Pardon me. I was about to add that they also sold clams and salmon to the Hudson's Bay Company,

although this was relatively minor, but it was a part of the Hudson's Bay trade.

"Q. Thank you.

"A. I was going to add that the Hudson's Bay Company bought salmon and clams for shipment elsewhere within their own company, and this was for shipment elsewhere in the Northwest Coast area wherever they had a trade facility.

"Q. But for consumption?

"A. (Nods head affirmatively.)

TAYLOR, Cross

(R.S. 1513)

"Q. What about Commencement Bay?

"If I were a Village 5 Puyallup, could I feel reasonably confident that I would be able to go downstream and fish in Commencement Bay?

"A. If you were at Village 5 you would be living in Commencement Bay.

"Q. The entire portion?

"A. (No response.)

"Q. Could I not fish clear out to Brown's Point and Point Defiance if I so chose?

"A. Yes, sir.

"Q. What about across the bay on Vashon at the area as Neal Point, could I fish there if I wanted?

"A. There is dispute on that, among ethnologists. Certainly Marian Smith thinks so. Certainly others think this was, at least at times, *twana noquales*.

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(R.S. 1467)

TESTIMONY OF HATTIE CROSS
(R.S. 1467, 1479)

"DIRECT EXAMINATION

By Mr. Knodel:

"Q. Would you state to the Court your name and address, please?

"A. Hattie Cross.

"THE CLERK: Hattie Cross?

"Hattie Cross

HATTIE CROSS, Direct—by Knodel

(R.S. 1468)

"THE WITNESS: Hattie Cross.

"THE CLERK: How do you spell that first name?

"THE WITNESS: H-a-t-t-i-e.

"Q. (By Mr. Knodel:) And what is your address, Mrs. Cross?

"A. Route 6, Box 728, Puyallup.

"Q. And Mrs. Cross, when were you born?

"A. Oh, 1893, September the 2nd.

"Q. Now, you were not born on the Puyallup Reservation?

"A. No, I was born in the Hoods Canal.

"Q. Hoods Canal?

"A. (Nods head affirmatively.)

"Q. And when did you first come to the Puyallup area?

"A. In 1904 I came to the Puyallup Indian school.

"Q. You referred to the 'Puyallup Indian school.' Was there any limitation as to children that could enter that school?

"A. I didn't quite understand.

"Q. Was it limited as to who could go to that particular school?

"A. No, there wasn't. All the children from all reservations went to that school.

"Q. Is it fair to say that you had to be of Indian nationality?

"A. Yes.

"Q. You attended that school how long?

"A. Until 1910.

"Q. And did you graduate from that school?

"A. Yes.

"Q. And after this, did you—well, at what stage did
HATTIE CROSS, Direct—by Knodel

(R.S. 1469)

marry your husband, Silas Cross?

"A. I married him in 1911.

"Q. And he is now deceased; is that correct?

"A. Yes.

"Q. Now, directing your attention to the time that your husband, Silas Cross, and you were married, what date did you say?

"A. November the 11th, 1911.

"Q. 1911?

"A. (Nods head affirmatively.)

"Q. Well, taking the time from 1911 to 1920, do you recall any activity that your husband took part in as far as the tribe, the Puyallup Indian Tribe is concerned?

"A. Yes, he did. He was mostly in sports.

"Q. What type of sports were these?

"A. Well, baseball, and—oh, we used to have a, reunions every year.

"Q. All right, let's talk about these sports; what kind of, or who made up the baseball team?

"A. The Puyallup Indian boys made up the baseball teams.

"Q. And you say you had reunions every year?

"A. We had reunions that, after they closed the school, and then all of the former students had reunions at the school grounds.

"Q. When did they close the school?

"A. Well, I think about 1918, or somewhere in there. I am not sure.

"Q. Well, how about, say the Governmental function of the Puyallup tribe, do you recall your husband taking an active part in that?

HATTIE CROSS, Direct—by Knodel

(R.S. 1470)

"A. Not until the later years.

"Q. Well, what years would you place this at?

"A. Oh, about 1927, from there on.

"Q. Do you recall, during your time in 1910, 1911 and directing your attention to the years from 1911 to, say, 1920, whether there was anybody or group of individuals that would govern the Puyallup tribe?

"A. Yes, there were. Oh, there was a committee there at all times.

"Q. Do you remember any of those committee people's name per chance?

"A. Well, Mr. Meeker, and Mr. Swadell, and Mr. Sica. And I don't know what years they served, but then they were all on the committee at different times. Willie Jim and Whoopdy John and Joe John, Mr. Goudy, Mr. Wilton.

"Q. Now, directing your attention back to the school again, was there any type of language that was spoken in school other than English?

"A. Well, when the children get together by themselves, they talked to themselves, you know, run each other in their native tongue.

"Q. What was their native tongue?

"A. Some were Puyallup, and some were Yakima, and some were Idaho.

"Q. Did the Puyallup—

"A. Everybody has a different accent.

"Q. Well, did the Puyallups have a tongue of their own?

"A. Yes.

HATTIE CROSS, Direct—by Knödel

(R.S. 1471)

"Q. And was that spoken as late as 1910?

"A. We weren't supposed to speak it, but we did on the sly.

"Q. Why do you say you weren't supposed to speak it?

"A. Well, they wanted us to learn the English language.

"Q. Is it fair to say then that they discouraged the speaking of your native tongue?

"A. Yes.

"Q. Now, did you see any fishing activities that took place by the Puyallups, say, from 1911 on?

"A. Well, my own family did quite a bit of fishing, and everybody, all the Indians that lived on the river fished. And the other people that lived close to the creeks, like Wapato Creek, and the Hylebos Creek, and Clarks Creek, and First Creek, they all fished in the creeks. They were closer to their homes.

"Q. Now, you say they fished in their creek, how long did they continue to do this fishing?

"A. Oh, they continued until they, the game wardens came after them. I don't remember whether or not, and I don't know when that was.

"Q. And after the game warden came after them, did that terminate the fishing?

"A. Not exactly.

"Q. Well, let's put it in another manner; did it discourage daylight fishing after that?

"A. Yes, it discouraged them from fishing there. They would have to be fishing on the sly.

"Q. Now, these various fish that were, fishing methods that—well, can you tell us something, a little about

HATTIE CROSS, Direct—by Knodel

(R.S. 1472)

what type, that you can recall yourself, the type of fishing gear?

"A. Well, the only fishing that I know was gill net, gill net in the river, then, or in the sound, wherever they were fishing, they used the gill nets. But in the creeks, they used the spear, or a gaff hook, or dip net.

"Q. Did they use any other type of fishing apparatus?

"A. Not that I know of.

"Q. Do you know of any fishing traps that were used at any time?

"A. Well, my mother-in-law has a fish trap right by our house.

"Q. What creek, or which river?

"A. In the Wapato Creek.

"Q. Was this in operation regularly, or could you describe it?

"A. Well, it was there all the time. Whenever the fish were running in the creek, well that is when she had her fresh salmon.

"Q. Now, Mrs. Cross, talking about salmon, do you still put up salmon?

"A. Yes, I do.

"Q. Would you tell the Court what procedure you follow, or how do you handle the salmon?

"A. Well, first the boys bring the salmon home and then we butcher them. Then we clean them, cut the meat, take the bone out and cut the meat, then salt them over night; then the next morning, we wash them and spread them out, and we take cedar sticks and spread them all out so that they

HATTIE CROSS, Direct—by Knodel

(R.S. 1473)

will be laying flat. And then we hang them up in our smokehouse. They are supposed to hang from fifteen to twenty days before they dry.

"But in the later years, we learned how to can them. So, when they are smoked about three or four days, we bring them in the house, and put them in the jars and can them.

"Q. This smoking habit, this smoking procedure, has this been done, or how long can you recall, this being done?

"A. Well, ever since I can remember anything. My mother did it.

"Q. And is this one of your customs that you have carried over?

"A. Yes.

"Q. Let me ask you this question; do you have any salmon that you are smoking presently?

"A. Yes, the smokehouse is going right now.

"Q. Now, directing your attention to the church, was there any church that the Indians would attend?

"A. Yes, they had a church there that was down at Cushman, or the where the church is now.

"Q. What type of church was it?

"A. It was a Presbyterian church.

"Q. And do you recall, was that there when you started the school?

"A. It was there when I first came to the school, yes.

"Q. And was there any other type of church?

"A. There was a Catholic church, but it was across the river on John Coates, I think his name was. It was on John Coates' place.

HATTIE CROSS, Direct—by Knodel

(R.S. 1478)

expedite matters, as far as this witness is concerned.

"Except for the photographs, I am through with the witness.

"THE COURT All right.

"MR. CONIFF: Well, I do have one or two questions of Mrs. Cross.

"CROSS EXAMINATION

By Mr. Conniff:

"Q. Mrs. Cross, where do you reside now? I didn't get that into the record.

"A. I reside in, on my father-in-law's allotment.

"Q. I see. Whereabouts is that?

"A. It is between Firwood and Fife on the old Seattle highway.

"Q. Firwood?

"A. (Nods head affirmatively.)

"Q. Do you own that piece of property?

"A. Yes.

"Q. Could you sell it if you wanted to?

"A. Yes.

"Q. I am going to ask you if you voted in the last election?

"A. Yes.

"Q. I won't ask you who you voted for.

"A. I served on a school board for eighteen years.

"Q. I see.

"A. My husband served on the school board for fifteen years.

"Q. What school board was that?

"A. Firwood School District 99.

HATTIE CROSS, Direct—by Coniff

(R.S. 1479)

"Q. I see. Now, I take it that your interest in school boards was prompted by your children, I assume?

"A. I had a big family, yes.

"Q. I might ask how many children you have in your family.

"A. Seven.

"Q. Seven children?

"A. (Nods head affirmatively.)

"Q. And did they go to school in the Fife area?

"A. All in Firwood until the 8th grade, then they went from Fife High School, and *Chow-mowey* Indian school.

"Q. About when did your children get through high school, about what period of time?

"A. There is seven of them.

"Q. Well, that is, or I will withdraw the question.

"A. They all went through high school.

"Q. Now, I believe you testified that you and your husband were married on November 11th—

"A. 1911.

"Q. 1911?

"A. Yes.

"Q. Were you married in the church?

"A. No, we was married in the courthouse in Tacoma here.

"Q. Oh, I see.

. . .

TESTIMONY OF ATTORNEY BURKEY
(Land Title Attorney)
(R.S. 1568)

"Q. Can you recall at this time any patents, deeds, or grants which contained any reference in words or substance to a conveyance or purporting to convey any right, title or interest in the fishing?

"A. No. Not to my knowledge, no.

. . .

**LETTER OF A. H. MILROY TO COMMISSIONER
OF INDIAN AFFAIRS**
(R.D. Ex. FF)

In continuation of my special reports upon the legal status of the Indian Reservations of this Superintendency I have the honor to submit the following as my Special report upon the legal status and boundaries of the Puyallup Reservation. This reservation belongs to the survivors of those "tribes and bands of Indians" who were parties to the Medicine Creek Treaty of December 26, 1854, but by reference to that treaty it will be seen that

it was not one of the reservations therein set apart and defined.

The three reservations set apart and defined in article 2nd of that treaty are mentioned as containing only two sections each, while the Puyallup Reservation as at present constituted contains about 36 sections. It is one of three reservations indicated and agreed upon at the Fox Island conference of August 4, 1856 as mentioned in my special report of the Muckleshoot Reservation—which see—.

A threatening and dangerous dissatisfaction among the Indian parties to the Medicine Creek Treaty, upon discovering the meager reservations assigned them by that treaty, led to said Fox Island Conference and the assignment of the Muckleshoot and the ample Nisqually and Puyallup reservations—I use the word ample in speaking of the two latter reservations, as they are ample in comparison with the two square tracts “each containing two sections of twelve hundred and eighty acres” as described in the 2nd article of said treaty and in lieu of which, or in addition to which, said two ample reservations were agreed upon for the purpose of satisfying said dissatisfied Indians and insuring peace with them.

It will be seen by the original map of the survey of the boundary of the Puyallup Reservation forwarded to your office by Gov. Stevens December 5, 1856 (a copy of which is herewith enclosed that said reservation was set apart and its exterior boundary surveyed and established prior to the extension of the lines of the public surveys over the surrounding and adjoining lands, excepting the 5th Standard parallel which had been established.

There is not on the records or among the papers of this office a copy of the proceedings of said conference at Fox Island at which the area and location of the present Puyallup Indian Reservation was agreed upon—but all of the surviving Indians who were present at said conference assure me that it was the understanding and intention of both parties to said conference to have said reservation bounded in its westerly side by the shore of Puget Sound from the extreme south-easterly extremity of Commencement Bay around northerly to the northwest corner

of the reservation on the southerly shore of Admiralty Inlet—and I think that references to the proceedings of said conference will show the proper location of this reservation with reference to the Sound and the frontage upon, with uninterrupted access to the reservation was the intention and understanding of both parties.

Please see copy of the proceedings of said conference forwarded to your office with a letter from Gov. I. I. Stevens dated August 28, 1856. Whatever may be therein stated, the fact that the Indians who were parties to said conference (Fox Island) were fish and clam eaters and draw their sustenance almost wholly from the salt waters of the Sound, proves conclusively that they never would have voluntarily consented and never did knowingly consent to the establishment of that portion of the boundary of said reservation as indicated by the nearly north and south line between Stations No. 42 and 1 of said survey—crossing the mouths of the Puyallup River and the whole easterly end of Commencement Bay, over three miles—cutting them off in that distance from access to the valuable fisheries at the mouth of the Puyallup River, to which they always previously had access, and from access to the exhaustless clam beds at low water, along the shore of the Bay nearly a mile south of the mouth of the Puyallup and for over two mile north of the marshes of that river, and leaving capes and strips of land between the reservation and the waters of the Sound upon which no account white men have taken claims and deny this free access from their reservation to the waters of the Sound tho in many places, only a few rods distant—see map.—

The great and criminal blunder or rather neglect in the survey of this boundary—for it is the patent for a blunder—was in not making Station No. 1 (See original map of said survey) on the line of low water mark at the southeastern extremity of Commencement Bay, and making said line of low water mark then southerly with the meanders of the shore and crossing the mouth of the Puyallup River to the norhtwest corner of the reservation at Station No. 13, the western boundary of the reservation. This would have made the boundary in accordance with justice and the understanding of the Indians, and

avoided all subsequent trouble about this matter.

A glance at the original map of the survey and location of the boundaries of this reservation will show the very culpable blunder from ignorance or the very rascally neglect from" of the surveyor who made said survey and location.

Starting at "a Fir tree" he seems to have blundered on, and which he makes "Station No. 1" he went 'zig-zagging' around without regard to the points of the compass—private land claims, shape of the reservation, or anything else, except plenty of corners, courses and distances, until he arrived at Station No. 13 where common sense would have dictated a stop, and the naming of the shore line around crossing the mouths of the Puyallup River to the nearest point to his "No. 1 Fir tree"—But instead of this he went ahead zig-zagging and making corners, courses and distances around the shore of the Sound 29 Stations further (all wholly useless) till he arrived at Station No. 42. Here, having got tired—whisky gave out—or for some other reason he stopped zig-zagging and by triangulation, or otherwise, shot a straight line 234 chains and 50 links (about three miles) to the "Fir tree" as Station No. 1. A glance at the map will show that this line crossing lagoons, inlets, marshes and the mouths of the Puyallup River could not have been measured with the chain. Justice and good faith imperiously demand the correction of the great blunder of having made said line between Stations No. 1 and 42 the western boundary of the reservation instead of the lines of low water mark on the eastern shore of Commencement Bay. But as the Government has taken advantage of this blunder and surveyed and sold a portion of the lands between the line from Station No. 1 to Station No. 42 and the Bay, and as the matter has now become complicated and difficult of adjustment—therefore as a compromise with justice and to avoid disturbing land owners and vested rights as much as possible, I propose to shift to the line of low water mark on the eastern shore of Commencement Bay, so much of the western boundary of the reservation now bounded by the line between Stations No. 1 and 42 as is situated between Station No. 42 and the line of low water mark on the north shore of the south branch mouth

of the Puyallup River. And to the end that this change in the boundary may be permanently fixed and legalized, I respectfully ask an Executive Order defining and fixing the boundaries of said reservation as follows to wit:

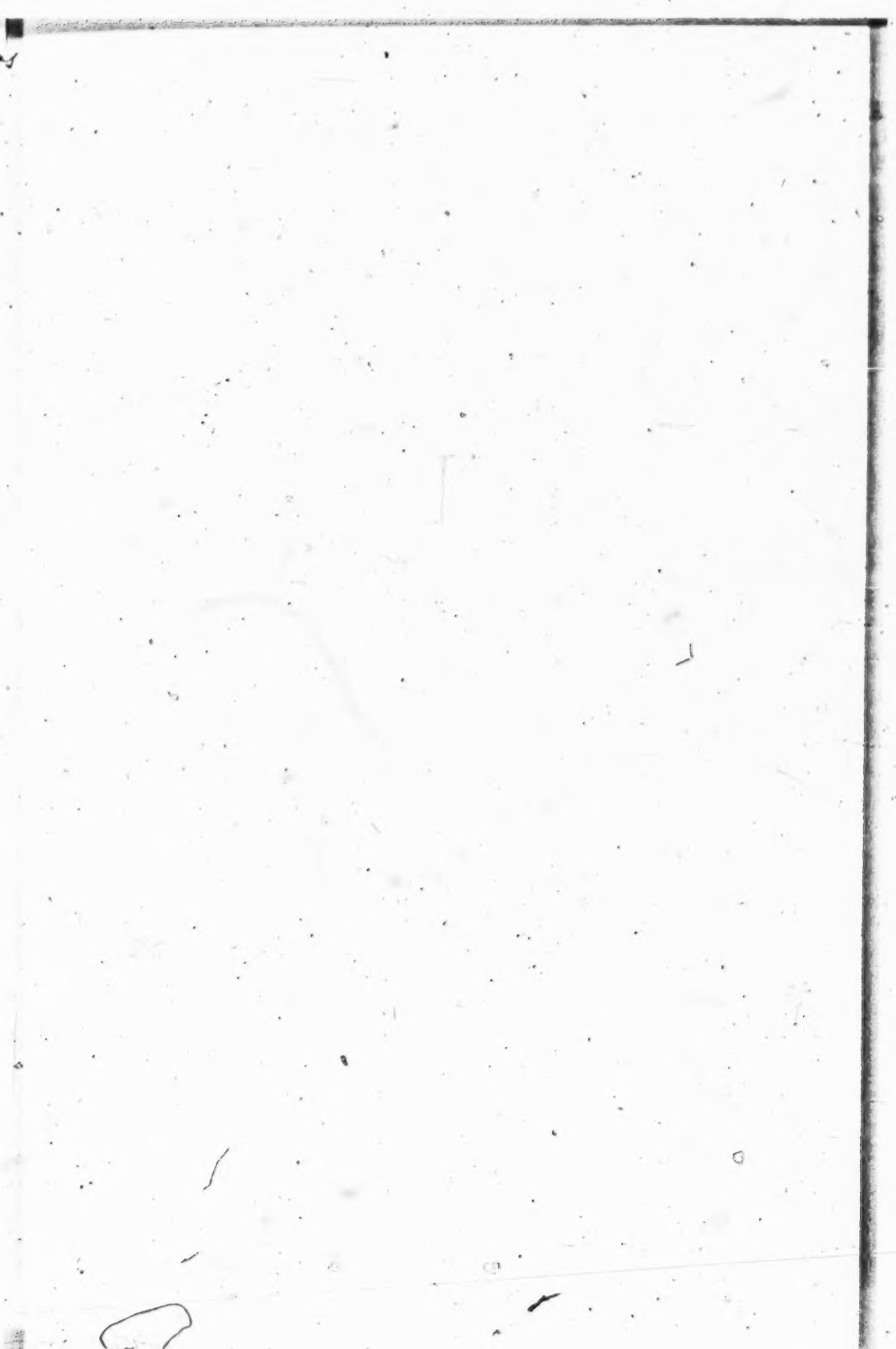
Beginning at the line of low water mark on the northern shore of the south branch mouth of the Puyallup River at a point where there same is intersected by the present boundary line of the reservation—then south with said boundary line to Station No. 1 as the same is indicated and marked on the original survey of said reservation—thence on to the different other stations in the order made and indicated by said survey with the courses and distances between the same to Station No. 13 of said survey—thence on the same course to a point where the same intersects the line of low water mark on the southerly shore of Admiralty Inlet—thence with the line of low water mark westerly and southerly along the shore of Admiralty Inlet and Commencement Bay with all the meanderings thereof to a point northeast of the north western extremity of the island between the north and south branch mouths of the Puyallup River — thence across the northern branch mouth of the Puyallup River to the line of low water mark on said northwestern extremity of said island—thence southerly and easterly with the line of low water mark around the shore of said island to the place of beginning—

In view of the fact that his matter has been several times heretofore brought to the attention of the Department by my predecessor and has long been a source of trouble and complaint on the part of the Indians of said reservation, and of the further fact that the terminus of the N.P.R.R. will most probably be soon located in the vicinity of this reservation which will cause a rapid increase of settlers and much augment the trouble growing out of this unsettled matter, and in view of this still further fact that the basis of value fixed by the commission headed by Gov. I. I. Stevens "to hold treaties with the Indian tribes in Washington Territory" to be paid to the Indians per capita for all lands ceded by them was \$10 for each chief—\$7.50 for each sub-chief and \$5 to all other persons (see record of proceedings of said Commission and the Indian parties to the Medicine Creek

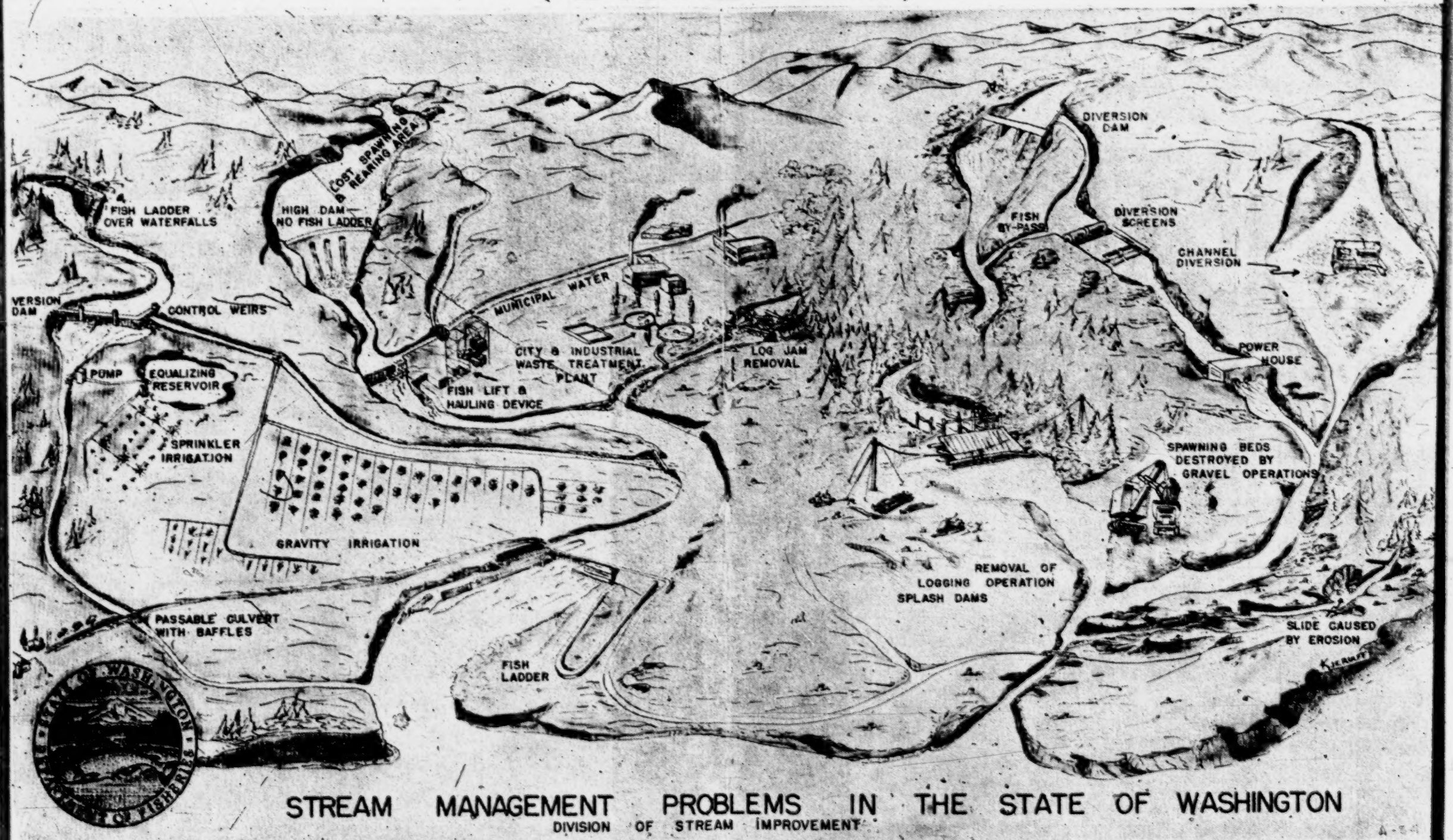
Treaty were treated with on this basis and the number fixed at 638 which gave them only \$32,500 for the vast and valuable country by them ceded, when in truth and in fact there were about 1,400 of them and they ought to have had at least \$75,000, said treaty thus being a fraud and a swindle upon said Indians—See report Comm. Indian Affairs of 1859 pp. 391 and 394—In view then of these facts and of the fact that our Gov. claims to be just and to do equity, I respectfully ask and urge as a small modicum of justice due these Indians that the boundaries of the Puyallup Reservation shall without delay be made to conform in part to the intention of the parties who authorized it as indicated.

All of which is respectfully submitted.

Signed, A. H. MILROY
Supt. Ind. Affairs
Washington Territory



WASHINGTON STATE DEPARTMENT OF FISHERIES
R. E. EX. 32, PAGES 48, 49
(73RD ANNUAL REPORT FOR 1963)



STREAM MANAGEMENT PROBLEMS IN THE STATE OF WASHINGTON
DIVISION OF STREAM IMPROVEMENT

WASHINGTON STATE DEPARTMENT OF FISHERIES
(73rd Annual Report for 1963)
(R.P. Ex. 32, Page 127)

Puget Sound Salmon

The highlight of the 1963 salmon fishery was the exceptional run of pink salmon to the Skagit, Dungeness and several other Puget Sound streams. The total catch of this species by net fishermen was 5,671,718 pink salmon while coastal trollers took 629,988 for a total of 6,301,706 fish. Breaking this down by gear; purse seines took 3,940,078 fish (62.5%), gill nets 1,094,957 fish (17.4%), trollers a record high of 629,988 fish (10.0%), reef nets 90,439 fish (1.4%), and miscellaneous Indian gears other than those fishing in common with the non-Indian fleet, 546,244 (8.7%).

H. G. MAISON, Individually and as Superintendent, Dept.
of State Police of the State of Oregon, *et al.*,

Appellants,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN
RESERVATION, *et al.*, *Appellees.*

No. 17139

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Feb. 15, 1963.

Robert Y. Thornton, Atty. Gen. of Oregon, Arthur G. Higgs and Roy C. Atchison, Asst. Attys. Gen., Salem, Or., for appellant.

Frank E. Nash, Mark C. McClanahan, King, Miller, Anderson, Nash & Yerke, Portland, Or., for appellees.

Before HAMLIN, Merrill and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

This ease involves fishing rights of the Confederated Tribes of the Walla Walla, Cayuse and Umatilla Indians under a treaty with the United States.

[1] The District Court had jurisdiction under the provisions of 28 U.S.C. §1131, relating to federal questions, and 28 U.S.C. §2201, the Federal Declaratory Judgments Act. The provisions of 28 U.S.C. §2281, requiring a three-judge court are not applicable and trial was properly had before a single judge.¹ Jurisdiction is conferred upon this court under the provisions of 28 U.S.C. §1291.

It appears that late in May of 1855 a joint council was held at Camp Stevens in the Walla Walla Valley of the State of Washington between representatives of the United States and certain Indian tribes of Washington and Oregon. At that council the plaintiffs' ancestors were persuaded to accept a treaty containing the following provision:

*"Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them."*²

The controversy here concerns that portion of the treaty provision which relates to the Indians' right to fish outside their reservation "in common with citizens of the United States."

In 1958 the Oregon State Game Commission promulgated regulations prohibiting fishing on tributaries of the Columbia and Snake Rivers during part of the year. Shortly thereafter, the Commission caused three Indians

1. 28 U.S.C. §2281 provides that where an injunction is sought restraining the enforcement or execution of a state statute or an order of an administrative agency acting thereunder, upon the ground of the unconstitutionality of such statute, the matter must be determined by a district court composed of three judges. But that provision has no application to this litigation, for the issue is not whether a statute of the State of Oregon or a regulation of its Game Commission is unconstitutional; rather, the issue is whether statutes and regulations, admittedly valid, can be applied to these plaintiffs. See *Phillips v. United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941).

2. Treaty with the Walla Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, Art. I, 12 Stat. 945.

to be arrested for fishing during the closed season in certain Blue Mountain streams that run into the Columbia. It further threatened to have arrested any members of the Confederated Tribes who fished contrary to the laws and regulations of Oregon.

Contending that the state's restriction of their fishing activities was contrary to the rights guaranteed them by treaty, the Confederated Tribes and several of its tribesmen sought a declaratory judgment and injunction. The court's judgment was generally favorable to the Indians:

"Ordered, Adjudged, and Decreed that the Confederated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake Rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha River systems; without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto."

Although the court declined to issue an injunction, it retained jurisdiction to grant such relief. The defendants have appealed.³

The extent of Indian fishing rights under a treaty between the United States and the Yakima Indians was in issue in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The court observed that prior to the treaty the Indians had unlimited fishing rights:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381, 25 S.Ct. 664.

Explaining the effect of the treaty upon these rights, the court continued:

3. The trial court's opinion is reported at D.C., 186 F. Supp. 519.

"New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." (Emphasis added.) *Ibid.*

The treaty involved in the instant case is substantially similar to the Yakimas' treaty and was negotiated at the same common council. Thus, the Supreme Court's analysis applies equally here. We hold that the plaintiffs' treaty reserves to them those unimpeded fishing rights which their ancestors had long enjoyed before the treaty, subject only to the qualifications contained within that document. But, the question remains, what are those qualifications?

One of them was pointed out in the *Winans* case. There it was stated that, because of the provision that the Indians were to fish "in common with citizens," the Indians had not retained an exclusive right to fish at their usual and accustomed stations. Citizens might share it.⁴ *United States v. Winans*, *supra* at 381.

Another of the qualifications was explained in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). In the former case it appears that one Tulee, an Indian, was convicted of catching salmon without a license required by a statute of the State of Washington. Tulee claimed the protection of the same treaty that was involved in the *Winans* case, arguing that it gave him a right to fish without restriction "at all usual and accustomed places" within the ceded area. The State countered with the argument that because of the phrase "in common with citizens" the appellant's rights were no greater than those of other citizens. The court did not wholly approve either contention, but said:

"We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves, the state with power to impose on In-

4. Of course, this does not mean that a state cannot, by reasonable laws and regulations, exclude from fishing those of its citizens who are not parties to the treaty.

dians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here." (Emphasis added.) *Tulee v. Washington*, *supra*, 315 U.S. at 684, 62 S.Ct. at 864.

We applied the doctrine of the *Tulee* case in *Makah*. In that case the State of Washington had, by regulation, prohibited the catching of fish in the Hoko River except with a certain type of gear. As justification for the application of its regulation to the Indians, the State argued that the provision in the Makah Indians' treaty granting to them the right to fish "in common with all citizens" meant that the rights of the Indians were the same, and no greater, than those possessed by other citizens. However, rejecting that argument, we said: "The Supreme Court held in the *Tulee* case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary'" *Makah Indian Tribe v. Schoettler*, *supra*, 192 F.2d at 226.

Thus, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation

of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food. In support of that contention they cite the testimony of three expert witnesses; namely, Robert N. Thompson, a fishery biologist of the Fish Commission of Oregon, Richard T. Pressey, Supervisor of Research for the Department of Fisheries of the State of Washington, and Dr. H. John Rayner, Chief of the Wildlife Research Division of the Oregon State Game Commission.

Thompson's testimony, to the effect that unrestricted fishing of sufficient industry could exhaust the spawning beds, is a proposition about which there can be no quarrel. However, he did not relate that proposition to the facts of this case, but, on the contrary, testified that the plaintiffs have never shown a disposition to fish with marked intensity.

Pressey testified that commercial fishing by Indians on spawning grounds in the State of Washington had seriously reduced some runs; further, that the taking of fish by the plaintiffs for their own subsistence would have a similar, although not as serious, effect. However, the trial court was not bound to accept this testimony. It was largely based upon the reports of an interested party; furthermore, the witness acknowledged that the number of fish had been increasing in the Blue Mountain streams in recent years and that, in the absence of depletion, there would be no need for regulation.

Dr. Rayner testified that the taking of fish from the spawning grounds creates an "unhealthy situation," that it is inconsistent with "efficient conservation methods," that "indiscriminate" fishing endangers the fish life of

stream, and that fish "must be protected" in their spawning beds. These statements are ambiguous and vague, but even if they reflected an opinion of the witness that restriction of plaintiffs' fishing was necessary for conservation, nevertheless, that opinion was not binding on the trial court.

In Dr. Rayner's view, "conservation" is a term which involves a compromise of the competing interests of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by "conservation," the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word "conservation" in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, "I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether."

[2] Such a statement is not evidence of that "necessity for conservation" required by the *Tulee* case. In that case the Supreme Court held that a regulation, to be necessary, must be "indispensable" to the effectiveness of a state conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others. Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society.

[3, 4] But even if the trial judge disregarded the many deficiencies and contradictions in the experts' testimony and attributed to that testimony some probative value on the issue of necessity, nevertheless, his decision that the defendants failed to sustain their burden of proof on that issue must be upheld. The trier of fact is not bound to adopt the conclusion of experts where it is contrary to his best judgment. *United States v. Hill*, 62 F.2d 1022 (8th Cir. 1933); *Tracy v. Commissioner*, 53 F.2d 575 (6th Cir. 1931), cert. denied, 287 U.S. 632,

53 S.Ct. 83, 77 L.Ed. 548 (1932). The trial judge could justifiably doubt the validity of the experts' conclusions in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining.⁵

Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing.

In its opinion the trial court stated:

"Although the closure of streams during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods of attaining the same objectives."⁶

It is apparent from this that the judgment not only was grounded upon a finding that no restriction of plaintiffs' fishing was necessary, but also, upon a finding that if it was necessary, the laws and regulations specifically involved in this case could not be imposed.

But the defendants argue that none of the alternative conservation measures specifically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the treaty.

5. In 1855 there were approximately 1500 Indians in the Confederated Tribes; at the time of the trial they numbered only about 1200.

6. *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 186 F. Supp. 519, 520-521 (D.Or.1960).

[5, 6] However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [*Tulee v. Washington, supra*], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), *aff'd* 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The judgment is affirmed.

Dated this day of January, 1968

s/ARTHUR KNODEL,

Attorney for Petitioner

LARRY CONIFF

Attorney for Respondent

FILED
JUN 12 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term 1967

No. **247**

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

ARTHUR KNODEL
Counsel for Petitioner
5505-20th Street East
Tacoma, Washington 98424

ARTHUR KNODEL
Counsel of Record,
5505-20th Street East
Tacoma, Washington 98424
May 31, 1967

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**IN THE
Supreme Court of the United States**

October Term 1967

No.

**THE PUYALLUP TRIBE, a Federal Organization,
*Petitioner,***

v.

**DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
*Respondents.***

**PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington**

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Puyallup Tribe, a Federal Organization, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Washington State Supreme Court in the above entitled case, the opinion of which was filed on the 12th day of January, 1967, and which became a final judgment on March 13, 1967, according to remittitur of Supreme Court dated March 15, 1967.

REFERENCES TO THE RECORD

Arrangements have been made through the stipulation of the parties and the cooperation of the Clerk of the

Washington State Supreme Court and by order of the Washington State Supreme Court to forward the entire original record to the Supreme Court.

References to the record are made herein as follows:

<i>Portion of Record Cited</i>	<i>Abbreviation Used</i>
Brief of Appellants	(R, BA, —)
Statement of Facts (verbatim record of the proceedings before the trial court)	(R, St, —)
Transcript (record of pleadings, motions, orders, etc., filed with the trial court)	(R, Tr, —)

OPINIONS BELOW

The memorandum opinion of the Pierce County Superior Court is unreported and is printed in Appendix B, *infra*, pp. A-14 - A-34. The opinion of the Washington State Supreme Court is printed in Appendix B hereto, *infra*, pp. A-34 - A-66, and is reported in 70 W.D.2d, p. 241 (1967). The remittitur by the Washington State Supreme Court to the Pierce County Superior Court is printed in Appendix B hereto, *infra*, p. A-67. The Pierce County Superior Court, in its ministerial function in compliance with the remittitur, entered the amended injunction which is unreported and is printed in Appendix B hereto, *infra*, p. A-68.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on January 12, 1967 (Appendix B, *infra*, pp. A-34 - A-66) and became a final judgment of said court on March 13, 1967. The remittitur issued March 15, 1967 (Appendix B, *infra*, p. A-67). The Pierce County Superior

Court in its ministerial function entered the final order (amended injunction) pursuant to the direction of the Washington State Supreme Court on June 2, 1967 (unreported, printed in Appendix B, *infra*, p. A-68.).

The jurisdiction of the court is invoked under 28 U.S.C. Section 1257(3). The question of jurisdiction was raised in the court of first instance and in the appellant court as hereinafter set forth, in the Statement, under the heading, "Stages at Which Federal Questions Were Raised."

QUESTIONS PRESENTED

1. Can the State of Washington by the exercise of the police power regulate rights reserved by Indians in treaties with the United States? If such power exists, what, if any, are the limitations of the State's power to regulate?

2. Do the courts of the State of Washington have jurisdiction to:

- (a) hear an action against an Indian Tribe without the consent of the Tribe or the United States Government?
- (b) determine that an Indian reservation does not exist where such reservation was established by treaty and never terminated by Congress?
- (c) determine the extent of the rights, privileges or immunities of an Indian's or Indian Tribe's Treaty with the United States Government with respect to fishing and further to affirmatively limit such rights, privileges or immunities to the same extent that all other citizens are limited.

3. Is the use of an injunction constitutionally valid to prohibit future criminal actions by an organization and its members and particularly where all of the members

are not before the court? Is the use of the injunction justified under the circumstances of this case?

THE TREATY AND STATUTES INVOLVED

The Treaty involved is that certain treaty known as the "Treaty of Medicine Creek." It is published in 10 Stat. at p. 1132, and is set forth in Appendix A, *infra*, pp. A-1 - A-9.

The Statutes involved are as follows:

62 Stat. 757, 18 U.S.C. 1151, Appendix A, *infra*, p. A-9.

67 Stat. 588, 18 U.S.C. 1162, Appendix A, *infra*, pp. A-9 - A-10.

Chapter 37.12, Revised Code of Washington, Appendix A, *infra*, pp. A-10 - A-13.

STATEMENT

1. Pleadings and Prior Proceedings

The State of Washington in its Complaint alleged that the Puyallup Tribe claimed special privileges and immunities from the application of state conservation laws and regulations to which it was not lawfully entitled. It asked the court to declare these claimed privileges and immunities void, and asked that the Tribe be permanently enjoined from destroying the fish runs in the Puyallup River (R., Tr. 1-6). The Tribe answered by denying the court had any jurisdiction over the persons or subject matter of the action and asserted that it was exercising its rights under the Medicine Creek Treaty of 1854 (R. Tr. 9-12).

The Superior Court, after trial found that the Puyallup Indian Tribe did not exist, that the Puyallup Indian Reservation did not exist, and that the State laws and regulations were reasonable and necessary to preserve the fishery (R., Tr. 95-102). The trial court then issued an

injunction prohibiting the Tribe from fishing in Commencement Bay and the Puyallup River contrary to the laws and regulations of the State of Washington (R., Tr. 103).

The Supreme Court of the State of Washington affirmed the trial court in all respects, except it ruled that the court had no jurisdiction to determine the non-existence of the Puyallup Tribe and that the injunction was too broad. The Supreme Court ordered the Superior Court to limit its injunction to those regulations that were reasonable and necessary to the preservation of the fishery (Appendix B, *infra*, p. A-52). The trial court, in its ministerial function, subsequently modified its injunction pursuant to the Supreme Court's direction and prohibited net fishing by the Tribe (Appendix B, *infra*, p. A-68).

2. Stages at Which Federal Questions Were Raised

In addition to the Answer denying jurisdiction and asserting the validity of the Medicine Creek Treaty, the Tribe raised by pre-trial motion (R., St. 4-11) (R., Tr. 15, 16) (R., Tr. 19-21) (R., Tr. 47-54), by motion and objections during the trial (R., St. 1364-1366), by post trial argument (R., Tr. 47-54), and by Assignment of Error to the Supreme Court of the State of Washington (R., BA 6, 7) the following matters among others:

"2. The Injunctive Order permanently enjoining appellants from violating state fisheries laws is invalid as such remedy is not available to enjoin such violations as to all citizens and appellants were denied the equal protection of the law.

"4. The lower court erred as it lacked jurisdiction in the cause as an Indian Tribe cannot be sued with-

out its consent and without the consent and authorization of the Congress of the United States.

"5. The lower court erred in making its declaratory judgment and entering its permanent injunction, as a Federal Treaty is supreme and controlling over state statutes and its terms cannot be abrogated by a State court.

"6. The lower court had no jurisdiction to terminate the existence of the Puyallup Indian Tribe and its declaratory judgment and injunctive order based upon such determination are invalid.

"8. The lower court erred in completely prohibiting and abolishing the reserved Treaty rights of the Puyallup Indian Tribe to fish within the exterior boundaries of the original Puyallup Indian Reservation including lands actually held in Tribal ownership, and its Declaratory Judgment and Injunctive Order are invalid.

"9. The lower court was without jurisdiction to abolish, terminate, or constrict the Puyallup Indian Reservation.

"10. The lower court was without authority to abrogate one of the terms of a Federal Treaty by completely abolishing the 'off-reservation' Treaty fishing rights of the Puyallup Indian Tribe.

"11. The 'off-reservation' Treaty fishing rights of the Puyallup Indian Tribe are not subject to restriction in any manner where there is no proof that such restriction is indispensable for the conservation of fish, and the lower court's judgment and injunction abolishing those rights are invalid."

The trial court answered the Tribe's jurisdictional arguments and authorities by the following statement in its memorandum decision:

"Since the beginning of the action, the defendants have sought to have the same dismissed, on the grounds that this court does not have jurisdiction. This motion to dismiss has heretofore been denied,

and the court adheres to the previous rulings without further comment." (Appendix B, *infra*, p. A-15.)

There are no findings of fact or conclusions of law relating to jurisdiction by the Trial Court. The majority of the Supreme Court held that the trial court had no jurisdiction to determine tribal existence and the courts of the State could not repudiate treaties of the United States. The Supreme Court made no opinion or comment on its or the trial court's jurisdiction to determine the existence of an Indian reservation or the requirement that an Indian tribe cannot be sued without its consent or the consent of the United States.

3. Essential Facts

* This controversy has arisen from an interpretation of the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132 (Appendix A, *infra*, pp. A-1 - A-10), which Treaty was entered into between the Puyallup Indian Tribe of the Puyallup Reservation as one of the signers thereof and the United States government. Article 2 of the Treaty, under which the Indians relinquished the bulk of their original lands, provided for the establishment of a reservation for the Puyallup Tribe. It provides as follows:

"... and a square tract containing two sections, or twelve hundred and eighty acres lying in the south side of Commencement Bay, all of which tracts shall be set apart and so far as necessary surveyed and marked out *for their exclusive use*. . . ." (Emphasis supplied)

government, in consideration of the relinquishment of By virtue of Article 3 of the Treaty, the United States

these vast holdings of land, promised and reserved to the Indians:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory. . . ."

These two treaty provisions have been construed to provide for two different types of Indian fishing rights. The first is fishing within the exterior boundaries of the reservation, which has been construed to be exclusively the right of the Indian Tribe without interference or regulation of the State. The second is fishing off the reservation at the usual and accustomed grounds and stations in common with other citizens, which has been construed to permit limited state regulation.

At the time this action was commenced in the court of first instance, the Indians were netting salmon and steelhead, both on and off the reservation, pursuant to their Treaty fishing rights. Their catch amounted to about three (3) to five (5) percent of the total fish catch from the Puyallup River anadromous fish runs (Appendix B, *infra*, p. A-32).

The State's expert witnesses testified to the many variables affecting the size of the fish run such as commercial fishing, pollution, natural predators, sports fishing and Indian fishing. They indicated that, due to the losses of fish occurring from these variables, by the time the fish run arrived at the Tribe's Indian reservation and usual and accustomed fishing areas (Commencement Bay and Puyallup River) there were only enough fish left for the preservation of the fishery. The only fishing that could thereafter be permitted was low efficiency hook and line

sport fishing. The significance of this is that the bulk of the fish do not feed in the bay and river and consequently are difficult, if not almost impossible, to catch by permissible sport fishing methods,¹ (R., St. 856-862). The only method available to the Indians to catch fish with any degree of certainty is net fishing. The state regulations prohibit net fishing in Commencement Bay and the Puyallup River, and these regulations are now enforced against the Puyallup Indians by the court's injunction (Appendix B, *infra*, p. A-68).

REASONS FOR GRANTING THIS WRIT

1. The decision of the court below in the instant case specifically repudiates the decision of the Ninth Circuit Court of Appeals, in *Maison v. Confederated Tribes of Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963) (Appendix C, *infra*, pp. A-70 - A-78). This conflict was conceded by the Washington State Supreme Court on p. 253 of its opinion (Appendix B, *infra*, p. A-48), as follows:

"The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, *supra*, as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be 'indispensable' to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at 'usual and accustomed grounds and stations.'"²

1. The exception is steelhead fish which composes a small percentage of the run. It was admitted by Dr. Donaldson, a State witness, that in 1956 the sportsmen caught 18,500 steelhead to the Indian's 1,500 steelhead, and it is to be noted that the sportsmen fish up river from the Indian net fishery (R., St. 143, 144).

2. The Tribe raised this question at the lower court through several motions and objections and again by Assignment of Error to the Washington State Supreme Court. See the Tribe's 11th Assignment of Error (R., BA 7).

In answer to the above question raised by the Tribe, the Washington Supreme Court on p. 254 of its opinion (Appendix B, *infra*, p. A-49) stated:

"We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word 'indispensable' in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on the Indians claiming treaty rights."³

The present state of the law on this matter in the Pacific Northwest is greatly confused for the reason that there are three (3) different rules applicable in the three (3) different states. The State of Idaho follows the *Arthur* rule, which holds that Idaho may not regulate the activities reserved by an Indian treaty right. *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953) (fully discussed by Justice Donworth in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), Appendix C, *infra*, p. A-77). The State of Oregon, under the rule of the *Maison v. Confederated Tribes of Umatilla Reservation*, *supra*, (Appendix C, *infra*, pp. A-70 - A-78), permits regulation where the State can show that such regulations are indispensable. The State of Washington, under this case, has complete power to regulate where it can be shown that the regulations are reasonable and necessary, even though this in effect can prohibit Treaty fishing rights and in effect abrogates a portion of a federal treaty by placing Indians in the same status as all citizens.

There are presently thirty-six (36) tribes in the State

3. The *Tulee* case referred to by the Washington State Supreme Court is reported in 315 U.S. 681 (1942).

of Washington, with 18,582 tribal members. There are also tribes in Oregon and Idaho affected by this ruling. Practically all of them have similar treaty provisions. Some of these tribes have treaty rights to hunt and fish in two (2) states. For example, the Yakima Tribe exercises such treaty right in the State of Washington and Oregon, where they would in effect have two different rules applied, depending on whether they are exercising this treaty right in the State of Washington or in the State of Oregon. Undoubtedly, the three (3) learned judges of the Ninth Circuit Court of Appeals in the *Umatilla* case could foresee that any State regulation would have to be limited so as to protect the interest of the Indian Tribes, which are a minority group because not to do so would result in a total prohibition of a Treaty fishing right as in the instant case.

The question now is, which rule should be applied? This can only be determined by the United States Supreme Court.

2. The majority of the Washington Supreme Court and the trial court totally ignored the question raised by the Tribe, can a tribe be sued without its consent or the consent of the United States. The rule that a tribe may not be sued without its consent or the consent of the United States is well established by numerous federal cases including the United States Supreme Court. *United States v. United States Fidelity & Guaranty Company*, 309 U.S. 506 (1940) at pp. 512 and 513 (Appendix C, *infra*, pp. A-104 - A-112).

3. The Washington State Supreme Court decided that a reservation no longer existed principally on the basis

that nearly all of the land had been alienated by the Indians (Appendix B, *infra*, p. A-43). The United States Congress has enacted law directly contrary to the holding of the Washington State Supreme Court as to the effect of allotments of land and subsequent alienation by the Indians. In 62 Stat. 757, 18 U.S.C. 1151 (Appendix A, p. A-9), "Indian country" is defined in part as follows:

"Except as otherwise provided in sections 1154 and 1156 (liquor offenses) of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuances of any patent*, and, including rights-of-way running through the reservation. . . ." (Emphasis supplied)

Only Congress has the power to abolish a reservation. *United States v. Celestine*, 215 U.S. 278 (1909).

The Enabling Act of the State of Washington states that "Indian land shall remain under the absolute jurisdiction and control of the United States. . . ." 25 Stat. 676. There can be no doubt that the United States reserved regulation of on-reservation treaty fishing by the provisions of 67 Stat. 588, 18 U.S.C. 1162, which is quoted in the next section of this petition and specifically excepts fishing rights as a subject matter of state regulation within Indian country.

The State has no authority to terminate a reservation nor has it the authority to regulate Indian treaty fishing rights within a such reservation. It should also follow that the State of Washington has no right to eliminate on-reservation fishing rights by termination of the existence of the reservation.

4. The source of the State's right to regulate is *dicta* in the *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. State of Washington*, 315 U.S. 681 (1942), cases heard before the U.S. Supreme Court. Since these cases were determined, Congress has enacted laws indicating it did not intend to grant such jurisdiction and power to determine Indian treaty fishing rights to the States, 67 Stat. 588, 18 U.S.C. 1162 (which grants jurisdiction over criminal actions in Indian country to the States (Appendix A, *infra*, pp. A-9, A-10)) provides, in Section, (b):

"Nothing in this section shall . . . deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The State of Washington has accepted criminal and civil jurisdiction over "Indian country" by the adopting, in 1957, of Chapter 37.12, Revised Code of Washington (Appendix A, pp. A-10 - A-13). R.C.W. 37.12.060 prohibits the jurisdiction of the State to adjudicate the matter here determined in substantially the same words as the federal act above quoted. Thus, the law expresses the intent of Congress to reserve to the Federal Government the matters stated and it specifically includes treaty fishing rights as a matter withheld from State control.

The question should finally be determined as to whether the *dicta* in the above cases and the holding of the *Umatilla* case, which is based on this *dicta*, allowing regulation of off-reservation fishing rights by the State to a limited extent are still valid. The reservation of jurisdiction to the Federal Government in 18 U.S.C. 1162

is without express qualification as applying to "Indian country" only. This law withdraws Indian treaty fishing rights as an entire subject matter from State jurisdiction.

5. The Supreme Court of the State of Washington, by allowing the entry of an injunction against the Tribe by the trial court, has allowed the imposition of a summary criminal procedure upon the Puyallup Indians, including those who are not parties to this action. The amended injunction (Appendix B, *infra*, p. A-68) in effect prohibits the Puyallup Tribe from commission of future criminal acts. It thereby imposes a double sanction upon its members for the future exercising of their treaty fishing rights. It must be kept in mind that at the time this injunction was entered many of the members of the Tribe had not been individually served, many of its members were infants or perhaps incompetent, and many were yet to be born. No guardian *ad litem* was appointed to protect the rights of the infants and incompetents.

The remedy of the criminal law is adequate. It affords the proper procedure for protection of the suspected violator. The contempt procedure denies most of the fundamental procedural protections. There presently is no protection against double punishment or coercive employment of both remedies by the State. The contempt procedure denies the equal protection of the laws, due process of the law, a right of confrontation of witnesses, presumption of innocence, right to counsel, and right to trial by jury, among other protection afforded in the criminal procedures.

Summary of Reasons

This decision of the Supreme Court of the State of Washington has abrogated the Medicine Creek Treaty of 1854.

a. The determination that the reservation does not exist and the fishing rights within the reservation therefore are non-existent eliminates on-reservation fishing rights. This is clearly beyond the power of the State to determine, control or regulate.

b. The determination that off-reservation fishing rights are subject to the same standards applicable to all citizens, *i.e.*, reasonable and necessary for the protection of the fishery, eliminates in this particular case the ability to effectively catch any fish at all. The State laws and regulations prohibit the only effective means of catching fish in the off-reservation fishing areas.

Therefore, although the decision acknowledges the treaty's existence, all meaningful fishing rights thereunder have been terminated.

The Supreme Court and the trial court of the State of Washington have steadfastly ignored the problems of jurisdiction in the matters affirmatively determined. The only jurisdictional issue that the majority of the State Supreme Court acknowledged was in regard to the existence of a tribe. Undoubtedly it must have occurred to the Supreme Court that the Superior Court had enjoined an organization that it had just determined did not exist. After finding there was no jurisdiction to determine the existence of the Tribe, the State Supreme Court without distinguishing or justifying its position, determined that the Indian reservation no longer exists. There

was no answer to the Tribe's objections to lack of jurisdiction on basis of failure of consent by the Tribe or the United States government to be sued.

The lone dissent by Justice Donworth ably evaluates the principal authorities of the majority opinion. The constitutional supremacy of treaty rights of the United States precludes action impairing such treaty rights, and the Washington courts were without power to act unless authorized by Congress or the authority of the Supreme Court of the United States.

The Ninth Circuit Court of Appeals, in its *Umatilla* decision, ruled that the State may be allowed to regulate where absolute necessity requires it in the off-reservation fishing areas, giving the Indians first priority and consideration. The government of the State of Washington, including its courts, has demonstrated in this case that the Ninth Circuit's faith in the judgment and discretion of the State was misplaced. The State's intent is clearly to abrogate the Indian Treaty in respect to fishing rights. The State of Washington should not be permitted to regulate at all, or the erosion or termination of Indian Treaty rights is a certainty.

This case would merit the review of the U.S. Supreme Court if it only involved one Indian. However, this case will ultimately affect many tribes and thousands of Indians if it is permitted to become the law of the State of Washington. Undoubtedly, a refusal to review this case will cause a change of the law in other States as well.

The State of Washington has clearly asserted its rights to subject Indian treaties to the State's police power. The state has demonstrated it will undertake extreme remedies

to enforce its position against the Indians. The Supreme Court of the United States must act if Indian Treaty rights are to continue to exist.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR KNODEL

Counsel for Petitioner

APPENDIX A

TREATY AND STATUTES INVOLVED

EXHIBIT A

MEDICINE CREEK TREATY

FRANKLIN PIERCE

President of the United States of America

TO ALL AND SINGULAR TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac L. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about

midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses; and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may

deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and,

therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the said tribes and bands, have hereunto set their hands and

seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent Territory of Washington.

Qui-ee-metl,	his x mark. [L. S.]
Sno-ho-dumset,	his x mark. [L. S.]
Lesh-high,	his x mark. [L. S.]
Slip-o-elm,	his x mark. [L. S.]
Kwi-ats,	his x mark. [L. S.]
Stee-high,	his x mark. [L. S.]
Di-a-keh,	his x mark. [L. S.]
Hi-ten,	his x mark. [L. S.]
Squa-ta-hun,	his x mark. [L. S.]
Kahk-tse-min,	his x mark. [L. S.]
Sonan-o-yutl,	his x mark. [L. S.]
Kl-tehp,	his x mark. [L. S.]
Sahl-ko-min,	his x mark. [L. S.]
T'bet-ste-heh-bit,	his x mark. [L. S.]
Tcha-hoos-tan,	his x mark. [L. S.]
Ke-cha-hat,	his x mark. [L. S.]
Spee-peh,	his x mark. [L. S.]
Swe-yah-tum,	his x mark. [L. S.]
Chah-achsh,	his x mark. [L. S.]
Pich-kehld,	his x mark. [L. S.]
S'klah-o-sum,	his x mark. [L. S.]
Sah-le-tatl,	his x mark. [L. S.]
See-lup,	his x mark. [L. S.]
E-la-kah-ka,	his x mark. [L. S.]
Slug-yeh,	his x mark. [L. S.]
Hi-nuk,	his x mark. [L. S.]
Ma-mo-nish,	his x mark. [L. S.]
Cheels,	his x mark. [L. S.]
Knutcanu,	his x mark. [L. S.]
Bats-ta-kobe,	his x mark. [L. S.]
Win-ne-ya,	his x mark. [L. S.]
Klo-out,	his x mark. [L. S.]
Se-uch-ka-nam,	his x mark. [L. S.]
Ske-mah-han,	his x mark. [L. S.]
Wuts-un-a-pum,	his x mark. [L. S.]
Quut-a-tadm,	his x mark. [L. S.]
Quut-a-heh-mtsn,	his x mark. [L. S.]

Yah-leh-chn,	his x mark. [L. S.]
To-lahl-kut,	his x mark. [L. S.]
Yul-lout,	his x mark. [L. S.]
See-ahts-oot-soot,	his x mark. [L. S.]
Ye-tahko,	his x mark. [L. S.]
We-po-it-ee,	his x mark. [L. S.]
Kah-sld,	his x mark. [L. S.]
La'h-hom-kan,	his x mark. [L. S.]
Pah-how-at-ish,	his x mark. [L. S.]
Swe-yehm,	his x mark. [L. S.]
Sah-hwill,	his x mark. [L. S.]
Se-kwaht,	his x mark. [L. S.]
Kah-hum-klt,	his x mark. [L. S.]
Yah-kwo-bah,	his x mark. [L. S.]
Wut-sah-le-wun,	his x mark. [L. S.]
Sah-ba-hat,	his x mark. [L. S.]
Tel-e-kish,	his x mark. [L. S.]
Swe-keh-nam,	his x mark. [L. S.]
Sit-oo-ah,	his x mark. [L. S.]
Ko-quel-a-cut,	his x mark. [L. S.]
Jack,	his x mark. [L. S.]
Keh-kise-be-lo,	his x mark. [L. S.]
Go-yeh-hn,	his x mark. [L. S.]
Sah-putsh,	his x mark. [L. S.]
William,	his x mark. [L. S.]

Executed in the presence of us:—

M. T. Simmons, *Indian Agent.*
 James Doty, *Secretary of the Commission.*
 C. H. Mason, *Secretary Washington Territory.*
 W. A. Slaughter, *1st Lieut. 4th Infantry.*
 James McAlister,
 E. Giddings, Jr.
 George Shazer,
 Henry D. Cock,
 S. S. Ford, Jr.
 John W. McAlister,
 Clovington Cushman,
 Peter Anderson,
 Samuel Klady,
 W. H. Pullen,

P. O. Hough,
 E. R. Tyerall,
 George Gibbs,
 Benj. F. Shaw, *Interpreter*,
 Hazard Stevens.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

“In Executive Session, Senate of the United States,
 “March 3, 1855.

“Resolved, (two thirds of the senators present concurring.) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S’Homamish, Steth-chass, T’Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget’s Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

“Attest:

ASBURY DICKINS, *Secretary*.”

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the

United States to be hereto affixed, having signed the same with my hand.

[L. s.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:

W. L. Marcy, *Secretary of State*.

FEDERAL STATUTES INVOLVED

62 Stat. 757. 18 U.S.C. 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, Sec. 25, 63 Stat. 94.

67 Stat. 588, 18 U.S.C. 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within

such Indian country as they have elsewhere within the State or Territory:

Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section. Added Aug. 15, 1953, c. 505, Sec. 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, Sec. 1, Stat. 795; Aug. 8, 1958, Pub.L. 85—615, Sec. 1, 72 Stat. 545.

CHAPTER 37.12, REVISED CODE OF WASHINGTON

37.12.010 Assumption of criminal and civil jurisdiction by state.

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law-280, 83rd Congress, 1st Session), but such

assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways. *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 Resolution of request—Proclamation by governor, 1963 act.

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in R.C.W. 37.12.060.

37.12.030 Effective date for assumption of jurisdiction—Criminal causes.

Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in R.C.W. 37.12.010 committed by or against Indians in the lands prescribed in R.C.W. 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.040 Civil causes.

Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in R.C.W. 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in R.C.W. 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.050 State's jurisdiction limited by federal law.

The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

37.12.060 Chapter limited in application.

Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or

right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing; regulation thereof.

37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes.

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX B

OPINIONS AND JUDGMENT BELOW

No. 158069

TRIAL COURT'S
MEMORANDUM DECISION

DEPARTMENT OF GAME OF THE STATE
OF WASHINGTON, and the DEPARTMENT
OF FISHERIES OF THE STATE OF WASHINGTON,
Plaintiffs,

v.

THE PUYALLUP TRIBE, INC., a Federal
Organization, *et al.*,
Defendants.

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR PIERCE COUNTY

A few days before Christmas in 1854, Governor Stevens, representing the United States, met with representatives of the Nisqually and Puyallup Indian tribes, on the banks of Medicine Creek, and negotiated a treaty concerning land and hunting and fishing rights. The treaty was reduced to writing and signed by the authorities of the Government. It was also signed by the Indians representing their tribes, but since they could neither read nor write, their signatures were merely indicated by their mark (Ex. "A"). This treaty was ratified by President Pierce in 1855. At this time there were only a few white settlers, and the Puyallup Indians consisted of various groups with villages along the river and on the shores of Commencement Bay. Any ownership of land the Indians may have had was communal in nature.

At that time the river flowed peacefully into Commencement Bay; there were no dams on the river, no factories, no lumber mills, no commercial and industrial developments, no municipal sewage—nothing such as exists today.

The Puyallup Indians who inhabited the lower reaches

of the river and the area around Commencement Bay depended for their subsistence, to a large degree, on the fish they caught in these waters and the shellfish they found on the shores.

Article 3 of the Medicine Creek Treaty provides as follows:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter."

Now, over a hundred years later, we are concerned with the rights of the defendants under this Article of the treaty.

Since the beginning of this action, the defendants have sought to have the same dismissed, on the grounds that this court does not have jurisdiction. This motion to dismiss has heretofore been denied, and the court adheres to the previous rulings herein on that point without further comment.

Three primary questions are presented to this court for determination. They are:

1. Is there a Puyallup tribe which succeeds in interest to the rights of the signers of the Treaty of Medicine Creek?
2. Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?
3. Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

It may be that the answer to any one of these questions would obviate the necessity of answering the others;

however, in view of the facts and law involved, and the interest of the parties in the answers to all three questions, the court proposes to answer each one.

In answering these questions, it is necessary to look at the facts and the law as they exist today, and not as they existed over 100 years ago or even 50 years ago, as many changes have occurred in the intervening years.

QUESTION No. 1:

According to the testimony of Dr. Herbert C. Taylor, Jr., an anthropologist and Dean at Western Washington College, in 1790 there were about 800 to 1000 Puyallup Indians; in 1839 there were 484, in 1844, 207, and by 1854, at the time of the signing of the treaty, there were about 100.

Dr. Taylor says the lower Puyallup Indians were assimilated into the white development of the area and were destroyed as a cultural identity.

He defines a tribe as "A group of a simple kind, in a definite locality, speaking a common language, with a single government." The Puyallups in 1854 were a tribe, but are not now by this definition. They can only be identified now by inheritance.

Dr. Colin E. Twedell, also an anthropologist, was able to trace many of the individuals listed in the 1929 roll of Puyallup Indians by at least some degree of blood, back to the original signatories of the treaty. Dr. Taylor says that the Puyallup Indian culture is dead—that the only thing that survives are memories. They are now Americans by "cultural assimilation;" what was two cultures has become blended into one.

Defendants contend there is a present, existing Puyallup tribe evidenced by their tribal roll of 1929 (Ex. "H") and that it has been recognized by the Federal government, and only Congress can terminate their tribal existence. There are 344 members according to the 1929 roll.

Recognition for one purpose does not mean, however,

that there is recognition for all purposes. The fact that the government would take cognizance of a tribal roll for distribution of funds does not mean recognition as successors to the rights of signatories to the treaty. The testimony at the trial indicated that the roll was prepared to cover the distribution of funds, and that blood quantum was not a necessary prerequisite for inclusion in the roll.

Is the present Puyallup tribe any different than say the Italian-American Club, the Order of Ahepa, or Sons & Daughters of Norway? The fact that some blood relationship may be required by one organization and not by another, doesn't alter the fact that the purpose may be merely social, fraternal, et cetera.

It is urged that the tribe is more than this because they have a communal right granted by the treaty which carries on down to the present time.

The evidence indicates, however, that most of the matters considered at meetings of the tribe, or tribal council, deal with enrollment, operation of the cemetery, and the disposition of trust funds.

The only Indians who appear to assert their rights to fish, are the individual defendants other than the tribe itself. In an effort to establish the ownership of a fishing right, some of the Indians paid to the tribe a fee of \$25.00 for the right to fish for a year, but there was no effort to enforce the licensing fee, and its collection was dropped. It thus appears that except as they are actively defending this suit, the tribe has not in fact at any time before asserted its communal ownership of fishing rights.

The defendants in this case are no longer wards of the government. They are citizens of the United States, and over the years have blended their status with all other citizens to the extent that they no longer retain any exclusive rights that were granted by the treaty. To say that they have any superior rights to others would make them super citizens, enjoying rights and privileges not given to others in the community.

At the time of signing the treaty, it would probably

be safe to say that they were savages. Savage, as defined in Webster's 3rd International Dictionary, is "a person living in a primitive state or belonging to a primitive society."

Would anyone assert that they are savages now? Certainly not, and they would be justifiably insulted if anyone would do so.

They are citizens of our county and state, with all the rights, privileges and responsibilities of any other citizen, no more—no less.

What have our courts said about continued recognition of a tribe? The case of *United States v. Sandoval*, 58 L.Ed. 107, a 1913 case, has been relied upon by both sides in discussing this question. The case arose out of a criminal prosecution for the sale of intoxicating liquor to the Pueblo Indians in the state of New Mexico.

The court pointed out that the lands belonging to the several Pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership.

This alone would distinguish the Puyallup Indians from the Pueblos.

Further identifying the Pueblos, the court said:

" . . . Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."

In 1854, the Puyallups could probably be distinguished from the white settlers on each of these characteristics, but as to each of these characteristics in 1965, there is nothing to distinguish the Indians from any citizen of the country.

The court further pointed out that the Pueblos were simple and ignorant people, dependent upon the fostering

care and protection of the government, and there was even a New Mexico statute which excluded them from the privilege of voting.

By contrast, the present Puyallups are not simple and ignorant, are not dependent upon the care and protection of the government, and have equal voting rights with all other citizens.

The court went on to say:

"It is for Congress, not the courts to determine when the true interests of the Indian require his release from guardianship. It is only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts."

The Puyallups are not now wards of the government, are not distinctly Indians from the point of view of their status as citizens, and, therefore, this court can determine for itself how they should be recognized and dealt with.

The right of the courts to deal with Indians directly, considering their changed status was dealt with in three early cases by Judge Hanford of the U.S. District Court for the Western District of Washington.

The first was that of *United States v. Kopp*, 100 Fed. 160, a 1901 case.

Judge Hanford there said:

"... Since the decision of the circuit court of appeals in that case (*Ross v. Eells*, 56 Fed. 855) the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and I hold that

by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes. The circuit court of appeals agreed with this court in holding that the sixth section of the act of February 8, 1887, confers the right of citizenship upon the Puyallup Indians to whom lands were patented under the treaty of 1854; and, so far as the opinion delivered by Mr. Justice McKenna indicates the mind of the court, there is no disagreement with this court as to the nature of the estate granted by the patents. I feel justified, therefore, in adhering to the conclusion reached in that case, — that each patent conveyed a title in fee simple, subject to forfeiture upon conditions subsequent, and with a restriction upon the right of alienation for a period to be determined by future legislative enactments."


The court said:

"The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States having all the rights, privileges and immunities of other citizens, and they are not under guardianship of the United States government, nor under the charge of any Indian superintendent or agent."

United States v. Ashton, 170 Fed. 509 (1909) was an action to quiet title to certain land, where the court held that although the tribe had not been dissolved by any formal proceeding, it was disintegrated by the enfranchisement of its members. This case will be referred to again under the question concerning the existence of the reservation and its boundaries.

In re Celestine, 114 Fed. 551 (1902) the court said.

"... Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the Negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the



Supreme Court, in an opinion written by Mr. Justice Bradley, has said:

“When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.” *Civil Rights Cases*, 109 U.S. 25, 3 Sup. Ct. 31, 27 L.Ed. 844.”

It is urged that the treaty with the Indians was a treaty with a separate nation and that as such only Congress can make or change treaties—this despite the fact that the Indians individually and as a tribe, so far as that term is applicable, are within the territorial limits of the United States, and the Indians are now citizens of the United States as well.

Montoya v. United States, 45 L.Ed. 521 (1901), discusses Indians as nations in the following language:

“The North American Indians do not, and never have, constituted ‘nations’ as that word is used by writers upon international law, although in a great number of treaties they are designated as ‘nations’ as well as tribes. Indeed, in negotiating with the Indians the terms ‘nation,’ ‘tribe,’ and ‘band’ are used almost interchangeably. The word ‘nation’ as ordinarily used pre-supposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word ‘nation’ a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being,

in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."

The Puyallup tribe clearly does not qualify as a "nation" as pointed out by the court in that case, and this argument about the tribe being a sovereign nation is without merit.

The case of *Oklahoma Tax Com. v. United States*, 87 L.Ed. 1612 (1943) involves the right of the state to impose inheritance taxes on the estate of deceased Indians.

The court held that although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy. They are actually citizens of the state with little to distinguish them from all other citizens.

These Indians as well as the Puyallups, have a state that supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Indeed, if need be, they are eligible for welfare as well.

Having accepted the same benefits of other citizens, by becoming citizens and no longer being wards of the government, are they also entitled to retain benefits not afforded to other citizens? This court thinks not. By all

the changes over the years, the tribe has lost its identity as a successor in interest to the treaty, and has accepted equal footing as citizens with no special privileges not available to all.

Our own court, in an early case, decided the status of individual Indians. *State v. Smokalem*, 37 Wash. 91 (1904). The case arose on the question of whether or not the state had jurisdiction in a criminal case over an Indian who committed a crime against the person of another Indian within an Indian reservation. In this case the court said:

"... In 1883 or 1884 the lands on this reservation were allotted to the Indians in severalty, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, all restrictions against the alienation of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by the same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor customs. They had abandoned their tribal relations, so far as lay within their power, and had assumed the habits and customs of the whites among whom they dwell. The reservation is divided into school districts and precincts; some, at least, of the Indian children attend the public schools maintained under the general laws of the state; precinct officers, such as justices of the peace and constables, are elected and perform the duties of their offices, in their respective precincts. The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to."

The case holds that an Indian who has severed his tribal relations and assumed the habits and customs of the whites, is no longer a member of the tribe.

At page 95, the court said:

"... It is not to be supposed that Congress intended that the remnant of a band of Indians, like the Puyallups, without tribal relations, without laws or customs, and without a government to administer them, should be left to prey upon each other and upon society at large, without restraint or fear of punishment from any source, unless they should commit one of the felonies enumerated in this act."

While this case dealt with the status of an individual only, nevertheless it and the other case law, together with the facts showing the change-over the past 100 years, leads this court to the conclusion that there is no Puyallup tribe which succeeds in interest to the rights of the original signers of the Treaty of Medicine Creek.

We turn now to the second question: Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

At page 17 of the brief of the defendant *Satiacum*, it is asserted that the Puyallup Indian tribe owns the tidelands abutting on, or appurtenant to their original reservation established by treaty and executive order to "extreme low water." Indeed, it is probably necessary for the defendants to make this assertion, or otherwise they would be trespassing in their pursuit of their fishing activities.

But what about the owners of the lands along the shores of Commencement Bay, and the banks of the Puyallup River? Are the homes, factories, mills, warehouses, parks, et cetera, et cetera, encroaching on the property of the Indians?

The reservation established for the Puyallup Indians covers an area from Pt. Defiance along Commencement Bay, up the Puyallup River for several miles, across it and then along the north side of it, and Commencement Bay to Brown's Point (Pl's Ex. 12; Def's Ex. "00").

Article 6 of the Treaty of Medicine Creek provides:

"The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor."

In 1887, Congress passed the General Allotment Act (24 Stat. 388), authorizing the division of reservation land among individual Indians with a view towards eventual assimilation into our society.

In 1893, Congress passed the Puyallup Allotment Act (27 Stat. 633) which established a commission to allot the lands of the reservation to the Indians in severalty, and set up a ten-year trust period from the date of passage of the act (March 3, 1893) during which time the allottees would not have the power to alienate their individual tracts.

Some question having been raised as to title when sales were made under this act, Congress in 1904 passed the so-called Cushman Act (33 Stat. 565). This act provides as follows:

"Be it enacted by the Senate and House of Repre-

sentatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation 'for a period of ten years from the date of the passage' thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon their sale by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

"Approved, April 28, 1904."

The law seems to be clear, that a reservation cannot be changed or done away with, except by an Act of Congress. The question, therefore, seems to be whether or not the acts of Congress referred to, did, in fact, do away with the reservation when sales were made by Indian allottees.

Mr. Louis J. Burkey, an officer of, and attorney for the Tacoma Title Company, testified concerning a reservation and stated that reference is always made to the fact that certain land is within the Puyallup Indian Reservation and that he knew of no act which removed the existing boundary lines of the reservation. It appears to the court, that his testimony merely indicates that reference to the reservation is made simply as a geographical reference point.

He further testified that in conveyances covering lands within the original reservation boundaries, there are no restrictions or references to any fishing rights. In other words, title is free from any claim of any Indian as to fishing rights, ownership of tidelands, access rights, or any other claim that could be asserted, based upon the Medicine Creek Treaty.

An early case of *United States v. Celestine*, 54 L.Ed. 195 (1909), is relied upon by defendants. This was a

criminal case in which the crime was committed on the Tulalip Indian Reservation.

Although a patent had been issued, the tracts remained within the reservation. The court said:

"When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

However, the treaty with the Tulalip Indians provided for only a *conditional* alienation of the lands, making it clear that the special jurisdiction of the United States had not been taken away.

The defendants also rely on *United States v. Winans*, 49 L.Ed. 1089 (1905). In this case the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purposes mentioned.

The case holds that the right secured to the Indians could not be extinguished by the United States or the state in granting patents to land, but says nothing of effect of allotments and sales by Indians.

An early case dealing directly with the question of whether the reservation had been abolished by allotment and sale is *United States v. Kopp*, 110 Fed. 160 (1901), referred to earlier in this opinion. In that case Judge Hanford dismissed a charge against Kopp for selling liquor to a Puyallup Indian. He held that the United States had not proved the vendor to be a Puyallup Indian. The judge said:

"Since the decision of the Circuit Court of Appeals that case (*Eell v. Ross*, 64 Fed. 417), the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the Act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished,

except the part retained as a site for an Indian training school, and use of the government for other purposes." (Emphasis supplied)

The same judge in the case of *United States v. Ashton*, 170 Fed. 509 (1909), a quiet title action, said:

"Every one of those patents extinguished all the rights of the tribe as a community with respect to the tract of land conveyed by it. The fishing rights secured to the Indians by the treaty, were by its express declaration a mere privilege to be enjoyed in common with all citizens and logically antagonistic to any claim of an exclusive or adverse right and entirely lacking in all of the essentials of a grant of an inheritable estate."

By this case, title to the tidelands was quieted in defendant as against any claims of the Indians.

A very recent case is that of *Klamath & Modoc Tribes v. Maison*, 338 F.2d 620 (1964), construing a Termination Act of Congress providing for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians. The case is important as to the extent of termination of Indians' rights upon termination of a reservation. The court said:

"We agree that the Termination Act has not expressly dealt with any treaty rights respecting hunting and trapping. It has, however most certainly reduced the area to which these rights attach. By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, *supra*, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. *Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.*" (Emphasis supplied)

To the same effect is *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963). The intent of Congress as to the

status of Indians is evidenced by House Concurrent Resolution 108, 83rd session, which states in part:

"Whereas it is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

"Whereas, the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: . . ."

What is a reservation? It has been defined in the case of *United States v. McGowan*, 82 L.Ed. 410 as follows:

"An Indian reservation consists of land validly set apart for the use of Indians, under the superintendence of the Government, which retains title to the lands."

In the case at bar, there is neither superintendence or retained title as to the alienated lands.

Our own court has considered this question in *State v. Satiacum*, 50 Wn.2d 513. In that case Judge Donworth said:

"We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup river, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the original Puyallup Indian reservation, in view of the decision in the *Pioneer Packing Co.* case."

Defendants say that this is a *res judicata* of the question, and if this were so, this court would feel it was bound by this opinion. However, Judge Hill, in that case said that there is no majority opinion. He went on to say:

" . . . nothing is decided except that the order dismissing the charges against the defendants is affirmed."

This court therefore takes the position that it is not bound by Judge Donworth's statement. It is the opinion of this court that the Puyallup Allotment Act of 1893 (27 Stat. 633) and the Cushman Act of 1904 (33 Stat. 565) in effect abolished the reservation and any fishing rights attached thereto as to any land sold subsequent to the allotment to individual Indians.

By these Acts, Congress evidenced, by the only means possible, its intent to abolish the Puyallup reservation through alienation. All the lands within the original boundaries of the reservation which have been sold are, therefore, no longer a part of the reservation, and all fishing rights claimed as being appurtenant to those lands have been abolished.

Turning now to the third question:

Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

At the outset, the court recognizes that there is a line of cases requiring the state to show that the regulations are "indispensable" in the conservation of fish, and this will be touched on later.

In this case we are dealing with salmon and steelhead fish which are known as anadromous fish. Anadromous fish may generally be defined as fish that are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn.

At the time of the Medicine Creek Treaty, in 1854, the Puyallup Indians were fish and shellfish eaters, and depended largely on them for their subsistence. This was their only need for the fish except for a minor amount of bartering. It is safe to say that present conditions were not contemplated when the treaty was negotiated and signed. As Judge Rosellini said in *State v. Satiacum*, *supra*:

"Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each ought to share."

While Indians apparently were fishing in the manner sought here to be enjoined, in the years following 1934, it was not until 1953 that any difficulty arose. This was due to the fact that much of the fishing was done at night, and it was not until about 1953 that a regulation required fish buyers to report their purchases as to locations and from whom purchased, thus bringing their commercial sales to the attention of the state.

Fishing was done at night prior to the introduction of monofilament nets which are practically invisible in the water and snare the fish by the gills as they swim into them on their way up the river. Nets used prior to the introduction of this material were visible to the fish and they tended to avoid them, thus making night fishing more effective.

Much evidence was introduced by fish and game protectors, and by fisheries experts of both Washington and Oregon concerning the manner of fishing practiced by the Indians and the need for regulation of fishing.

The waters of Commencement Bay and the Puyallup River are part of the Puyallup Preserve. No commercial fishing is allowed, and sport fishing is, by regulation, confined to hook and line. Evidence shows that the Indians use set nets near the mouth of the Puyallup in Commencement Bay and in the river itself. These nets are as long as over 100 feet and deep enough to practically touch bottom. They are fastened to fixed objects, such as pilings or bridge abutments, and are tended from time to time by being lifted out of the water, and the fish removed. Other nets used in the Puyallup River are drift nets that extend from one side of the river to the other, and are allowed to drift downstream, snaring fish in their webbing as they go. The fish caught are used personally, but a large number are sold commercially.

The complaint of the state is that this method of fishing is against state regulations and has the effect of depleting or ruining the salmon runs.

As has been pointed out, originally the Indians only took enough fish for personal use and barter, which was inconsequential compared to the present demand for fish.

In order to maintain the run of fish, it is necessary to keep a proper balance of returning fish to the spawning grounds. Evidence indicated that there have been less and less returning fish from 1952 to 1964. The return went up sharply in 1964 because net fishing was curtailed at the mouth of the Puyallup River by a court injunction. The evidence indicates, however, that the Indian catch of salmon and steelhead is only about 3 to 5 per cent of the total.

It is argued by the defendants that commercial and sport fishing should be curtailed more, and that pollution in the streams, dams and dredging of the river, et cetera, cause the killing and depletion of fish runs, and not Indian fishing. The state argues, however, that all segments of the fishery must be regulated, and that pollution, dams, et cetera, are also regulated and taken into consideration in the over-all conservation program.

Fish swimming freely in the waters are not owned by anyone. Title is obtained when possession is obtained. We are here dealing, however, with a natural resource made available through the rivers and streams, and the right to regulate the fishing thus made available, and of thereby obtaining title to or ownership of the fish.

If the state has the right to regulate, the courts have adopted different rules as to what regulations may be adopted in order to preserve fish runs. *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (1951).

The defendants rely upon the case of *Maison v. Umatilla*, 314 F.2d 169 (1963), and contend that this court should adopt that rule. That case held that it is necessary for the state to show that the regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation. This court rejects this rule as being too strict, and imposes a burden on the state which is impossible to meet.

The case of *Tulee v. Washington*, 86 L.Ed. 1115 (1942) was one where Tulee was charged with fishing without a license. It was held that the state has power to regulate the manner of fishing to conserve fish, but

can't charge a license fee. This case is also authority for the proposition that the treaty did not give the Indians the right to fish unrestricted and free of any state regulation.

The conclusive case on this question so far as the state of Washington is concerned, is *State v. McCoy*, 63 Wn. 2d 421- (1963). Here, the defendant was fishing in much the same manner as were the defendants in the case at bar. At page 427, the court said:

"One essential of a conservation program is the regulation of the harvest of salmon in salt and fresh water areas. It is regulation that provides the escapement necessary to maintain a perpetual supply of salmon for the harvest by all people. If a fishery, within a river or off its mouth, harvests too many of the adult salmon because of the shallow confined nature of the fishing area and the habits of the salmon which cause them to school up and delay in these areas prior to ascending the river, there will be little escapement to perpetuate the runs. An uncontrolled fishery in such areas may harvest almost the entire run of a fishery resource. Salmon are not inexhaustible and without their proper escapement for reproduction from year to year through controls in the harvest, the stocks will be reduced to a point where only a remnant run will exist."

This language applies with equal force to the situation sought to be regulated in the case at bar. The case holds that the state has the power and the right to subject Indians to reasonable and necessary regulations for the protection of the fishing resource.

Without reviewing the evidence in this case, it is clear to the court that a large number of fish must survive back to spawning grounds regardless of pollution, predators, logging, dams, et cetera, and Indian net fishing prevents such survival. It is necessary to prohibit all non-sport fishing in Commencement Bay and the Puyallup River in order to conserve the fish. While there no/doubt is pollution and other man-made activities on the river that do adversely affect the fish, these in themselves

are not lethal, and any regulations covering any phase of fish protection are in vain unless the state also controls fishing in Commencement Bay and the Puyallup River.

Indians' unregulated gill net fishery in the Puyallup River has caused serious damage to the fish runs indigenous to that stream, and will, if permitted to continue, cause irreparable harm in that the fishery resource will be unable to sustain itself, in accordance with the basic principles of conservation. It follows that the regulations sought to be imposed by the state prohibiting net fishing in Commencement Bay and the Puyallup River are reasonably necessary for the preservation of salmon and steelhead fish.

From the answers to the questions in this case, the court concludes that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that a permanent injunction may issue enjoining the defendants from netting anadromous fish in Commencement Bay, the Puyallup River, or any of its tributaries.

DATED at Tacoma, Washington, this 27th day of May, 1965.

JOHN D. COCHRAN, *Judge*

WASHINGTON STATE SUPREME COURT DECISION

[No. 38611. En Banc. January 12, 1967.]

THE DEPARTMENT OF GAME *et al.*, Respondents, v.
THE PUYALLUP TRIBE, INC., *et al.*, Appellants.

- (1) **Judgment—Declaratory Judgment—Appropriate Controversies—Interpretation of Treaty Rights.** An action for a declaratory judgment under R.C.W. 7.24 was a proper method for certain state agencies to obtain a determination of whether certain Indians were immune from state fishing regulations by virtue of treaties between the United States and various Indian tribes, where the alternative method of obtaining relief would be a multiplicity of arrests for violation of the fishing regulations, and the jailing and detention of individuals for considerable

periods of time with consequent hardship to them and their families.

- (2) **States — Indians — Treaties — Repudiation.** The courts of this state do not have the power to repudiate and nullify treaties between Indian tribes and the United States.
- (3) **Same — Indians — Termination of Tribe.** The courts of this state do not have jurisdiction to make a judicial determination of the termination of existence of an Indian tribe, but such a tribe continues to exist so long as it is recognized as such by appropriate agencies of the United States or until Congress passes a termination act.
- (4) **Fish — Indians — Off-reservation Fishing — Disposal of Reservation.** The rights of individual Indians, under the Treaty of Medicine Creek, to fish at usual and accustomed grounds and stations, is not dependent upon any rights in reservation lands, and the off-reservation fishing rights are unimpaired by the fact that reservation lands have, pursuant to act of Congress, passed into fee simple private ownership.
- (5) **Same — Indians — Off-reservation Fishing — Regulation by State.** Indian treaty rights to fish at all usual and accustomed grounds and stations do not extend to permit fishing in such a manner as would destroy the fishery, but leave the states with power to impose such regulatory restrictions as are necessary for the conservation of fish. When a person charged with violation of state conservation regulations has established that he is a member of an Indian tribe having a treaty right to fish at all "usual and accustomed grounds and stations," the burden is upon the state to show that its regulations are reasonable and necessary to conserve the fishery.
- (6) **Same — Indians — Off-reservation Fishing — State Conservation Rules — Validity.** Insofar as Indian treaty rights to fish at all usual and accustomed grounds and stations are concerned, the test

to be applied in passing upon the propriety and validity of state regulatory restrictions is not whether they are "indispensable" to the preservation and protection of the fishery involved, but whether they are "reasonable and necessary" for that purpose.

HUNTER, HALE, and ROSELLINI, JJ., dissent.
DONWORTH, J., dissents in part.

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, John D. Cochran, J., entered August 13, 1965. *Reversed in part.*

Action for a declaratory judgment. Defendants appeal from a judgment in favor of the plaintiffs.

Arthur R. Knodel and Malcolm S. McLeod for appellants.

The Attorney General and Joseph L. Coniff, Assistant, for respondents.

HILL, J.—The Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, brought this declaratory judgment action¹ for the purpose of determining whether certain named individuals had, as members of the Puyallup Indian Tribe, any privileges or immunities from the application of state conservation measures.

The defendants asserted rights under Article 3 of the Treaty of Medicine Creek (10 Stat. 1132) between the United States and various Indian tribes including the Puyallups. This treaty was signed December 26, 1854; ratified by the United States Senate March 3, 1855, and proclaimed by the President of the United States April 10, 1855. This treaty was the first of a group of 11 treaties negotiated with the Indian Tribes of the Pacific

1. The case caption is erroneous, there being no entity known as "The Puyallup Tribe, Inc., a corporation." The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council.

Northwest between December 26, 1854 and July 16, 1855.

By the treaty, the Puyallup Indians ceded, relinquished and conveyed to the United States "all their right, title, and interest in and to the lands and country occupied by them," in return for which they received a reservation and certain rights, including those named in article 3 which reads:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory,^[2] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

The trial court concluded that the Puyallup Tribe no longer existed as an entity and that its members no longer had any rights under the treaty; that there was no longer any Puyallup Indian Reservation and, hence, that the Puyallup Indians had no fishing rights within what had been the reservation; and that

It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis. (Finding No. 4)

Consequently, the trial court permanently enjoined the defendants and all members of the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws of the State of Washington, or contrary to the rules and regulations of the Departments.

2. Each of the treaties with the Indians in Washington Territory preserved to the Indians the right to take fish exclusively in the reservations and at all usual and accustomed places (or, as in the treaty with which we are here concerned, "at all usual and accustomed grounds and stations"), in common with citizens of the Territory, or variably in common with citizens of the United States.

From that judgment, the Puyallup Indian Tribal Council appeals.

It is first urged that the state Departments are not entitled to seek relief under the Uniform Declaratory Judgments Act (R.C.W. 7.24.010 *et seq.*). Basically, the contention is that the issues here before us for determination should be raised in individual criminal actions brought against Indians who violate the food fish and game fish conservation laws found in Titles 75 and 77 R.C.W., or the regulations promulgated thereunder.

[1] A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.

Since the Indians who claim immunity from these regulations claim them under treaties between the United States and various Indian tribes, it seems to us that the state Departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act.

On the merits, both parties assume an extreme and adamant position.

The Departments take the position that the Indians never had, as against the United States, any right to the "use and occupancy" of any land; that they were and are a conquered people without right or title to anything. Having nothing to cede, there was no consideration for any promises made to them, and there is no necessity to respect those promises even though they were labeled "treaties."

[2] Our answer³ is that regardless of whether treaties with Indian tribes were necessary, they were deemed de-

3. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 55, 91 L.Ed. 29, 67 Sup. Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view

sirable by the United States and those entered into by it cannot be repudiated by this state or its courts.

The case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 273, 99 L.Ed. 314, 317, 75 Sup. Ct. 313, 314 (1955), on which the Departments rely, points out specifically that there were no treaty rights involved and says:

This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force. . . .

Nor is there anything in *Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L.Ed.2d 573, 581, 82 Sup. Ct. 562, 569 (1962), also relied upon by the Departments, which contains any suggestion that the United States is now about to allow a state to repudiate any treaty which the United States has made. The opinion does point out that,

In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 25 U.S.C. § 71.

and that there were no treaties with Alaska Indians. It should also have pointed out that the same enactment provided that "no obligation of any treaty lawfully made and ratified" with an Indian tribe prior to March 3, 1871, was "invalidated or impaired." The opinion does not directly or by inference imply that the United States was just playing "Treaty" with the Indians when the Senate ratified and the President proclaimed the treaty here in

of the majority opinion as to Indian rights and title in the aboriginal lands "when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land," does not suggest the abrogation of the treaties which have been ratified.

We commend, too, as an answer to the "hard-boiled" argument of the Departments, the article on "Original Indian Title" in "The Legal Conscience," a volume of the selected papers of Felix S. Cohen (pp. 273-303), in which he points out that the *Tillamooks* case, *supra*,

"... gives the final coup de grace to what has been called the 'menagerie' theory of Indian title, the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. . . ."

question. It was not the Indians, but the United States and the white settlers in the Territory of Washington who were asking for this and other treaties in 1854 and 1855.

The Departments further urge that if the Puyallup Indians ever had any fishing rights as such, their rights in the reservation area long ago ceased to exist; that the members of the Puyallup Tribe are 'all citizens of the United States and of the State of Washington and have no rights different from any other citizen.

The defendants, on the other hand, urge that they have rights under the Medicine Creek Treaty to fish on the reservation and at other "usual and accustomed grounds and stations" at any time and with any type of gear they choose and that they do not have to comply with any regulation, or if they have to recognize any regulation it must be "indispensable" to the preservation of the fishery. (This last position is posited on *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), which will be discussed later in this opinion.)

The observation of Mr. Justice Black in *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941), is still apropos:

We think the state's construction of the treaty is too narrow and the appellant's too broad; . . .

The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, notwithstanding their contentions to the contrary.

We will now consider whether the trial court erred in reaching the conclusion:

There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek (Conclusion of Law No. 1).

To support this conclusion, the trial court made findings Nos. 10 and 11.

While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club or the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with regard to membership, operation, of cemetery [sic], the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.

The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma (Finding No. 10).

In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendancy was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal

organization known as the "Puyallup Tribe" at this time (Finding No. 11).

[3] We are satisfied that so long as the United States government, through its appropriate agencies; continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribe's termination.

Historically and uniformly the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation.⁴ And even the Supreme Court of the United States defers to the executive and other political departments of government "whose more special duty it is to determine such affairs" stating that "If by them those Indians are recognized as a tribe, this court must do the same." (*United States v. Sandoval*, 231 U.S. 28, 47, 58 L.Ed. 107, 114, 34 Sup. Ct. 1, 6. (1913)).

The trial court's "Memorandum Decision" is a very able and scholarly document, and while we have disagreed on this phase of the case, we are persuaded by its presentation that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination.

The trial court also found:

All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small

4. For examples of such legislation see: Termination of the Klamath Tribe, 25 U.S.C.A. § 564; Termination of Wyandotte Tribe of Oklahoma, 25 U.S.C.A. §§ 791-807; Termination of the Peoria Tribe of Oklahoma, 25 U.S.C.A. §§ 821-826; Termination of the Ottawa Tribe of Oklahoma, 25 U.S.C.A. §§ 841-853; Termination of Menominee Tribe of Wisconsin, 25 U.S.C.A. §§ 891-902; and Termination of the Ponca Tribe of Nebraska, 25 U.S.C.A. §§ 971-980.

tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Finding No. 12)

The evidence supports this finding, and it is clear that though the Puyallup Tribe continues to exist, the entire reservation, except for the small tract to which reference was made, has passed into fee simple private ownership, consequent to congressional action, and that there is no longer a reservation.

Some questions having arisen concerning the power of the Indian allottees to convey complete fee simple title to their allotted lands, Congress confirmed the removal of the trust restrictions against alienation of the allotted lands. 33 Stat. 565 (1904).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive evidence of congressional intent is shown by the House Committee's Report on this bill:

This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely

as any other person may sell and convey real estate.
(H.R. Rep. No. 301, 58th Cong., 2d Sess. (1904))

Attached to the report, as an exhibit, was a letter from the Commissioner of Indian Affairs expressing the view that,

Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

There can be no question but that the legislation, as enacted, carried out the legislative intent.

Whether the land within the reservation remains in the possession of the original allottees, or whether it has passed into non-Indian hands, the result is the same, so far as the tribe is concerned: It has no legal interest in it. All of the land may be taxed by the state (except possibly the small tract reserved for cemetery purposes). *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295 (1905).

[4] While reservation lands are allotted and sold pursuant to an Act of Congress removing all restrictions upon alienation, there is no implied reservation of hunting and fishing rights. *United States ex rel. Marks v. Brooks*, 32 F. supp. 422 (1940), citing *Pennock v. Commissioners*, 103 U.S. 44, 48, 26 L.Ed. 367 (1881), and *Spalding v. Chandler*, 160 U.S. 394, 407, 40 L.Ed. 469, 16 Sup. Ct. 360 (1896).

The fishing rights of members of the Puyallup Tribe rest not upon any rights in the reservation lands, because these have been surrendered pursuant to the congressional action to which we have referred, but upon their "right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens of the Territory," derived from the Medicine Creek Treaty. We are well aware of the statement in *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. 662 (1905), quoted in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198, 63 L.Ed. 555, 558, 39 Sup. Ct. 203 (1919):

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superiour justice which looks only to the substance of the right without regard to technical rules.' 119 U.S. 1; 175 U.S. 1."

[5] We would protect these treaty rights as readily and effectively as they have been protected in *Winans, supra*, *Seufert Bros. Co., supra*, and *United States v. Brookfield Fisheries*, 24 F. Supp. 712 (D.C. Ore. 1938), but such rights are not absolute; they do not extend to the right to fish with such gear and at such times as would destroy the fishery. The United States Supreme Court, in *Tulee v. Washington, supra*, said:

[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Consistent with this statement by the Supreme Court, this court and the Ninth Circuit Court of Appeals have passed on the regulations imposed by the Departments with an eye to determining whether the regulations concerning the manner and time of fishing then in question were necessary to the conservation of the fishery and, hence, could be enforced against Indians whose rights to fish at their usual and accustomed grounds and stations were preserved to them by treaties similar to the one before the court in the *Tulee* case.

McCauley v. Makah Indian Tribe, 128 F.2d 867, 870 (9th Cir. 1942), was tried in the district court before the decision in *Tulee* was handed down, but heard in the circuit court following that decision. The district court had entered a sweeping injunction against the enforcement of regulations interfering with the Makah Indians fishing

in the Hoko River. The case was reversed with the closing comment.

The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the Tulee case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as "other Indian fishing gear," as they may be advised.

In *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951), again the Makah Indians sought an injunction against enforcement of certain regulations, and the district court dismissed the action; the Makahs appealed. The circuit court—citing the *Tulee* case, *supra*, and *Seufert Bros. Co. v. United States*, *supra*, and *United States v. Winans*, *supra*—summarily disposed of the contention which is also made here by the Departments, that the Indians had no rights against state interference which do not exist for other citizens. It quoted with approval *Tulee*, *supra*, concerning such restrictions of a purely regulatory nature relative to the time and manner of fishing outside the reservation as are necessary for the conservation of fish and then said:

We are not here concerned, as we were in *McCaughey v. Makah Indian tribe*, 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are "necessary for the conservation of fish" in the fall run of salmon in that river.

The decision of the district court is reversed and that court ordered to make and enter an order restraining the appellee from enforcing such regulations.

In *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963), we upheld a 10-day closure of all fishing on the Skagit River, designed to protect the peak of the salmon run passing through that river to the spawning grounds,⁵ on the basis that the regulation was necessary to conserve chinook salmon runs in the Skagit River. In that case, McCoy, a member of the Swinomish Tribe, was arrested for fishing near the mouth of the north fork of the Skagit River. He was operating an 18-foot, 25-hp-outboard-motor boat and using a 600-foot modern nylon gill net. The superior court found that he was not fishing on the reservation, but was fishing at "usual and accustomed grounds" and acquitted him, holding that his rights under the Treaty of Point Elliott (12 Stat. 927; January 22, 1855) gave him immunity to closure regulations. We reversed the judgment and sent the case back for a new trial, directing that the court determine whether the regulation violated was necessary to conserve the fishery.

We agree with the trial court that the rule of the *McCoy* case, *supra*, is the proper one to be applied where treaty rights and state conservation regulations are in apparent conflict. The burden of proof, once the defendant has established that he is a member of a tribe having a treaty right to take fish at all "usual and accustomed grounds and stations," is on the state to show that its regulations, which limit Indian fishing rights either as to the time or manner of fishing, are reasonable and necessary to conserve the fishery.

[6] The United States did not hesitate to adopt regulations it regarded as necessary to preserve the halibut fishery. The Makah Tribe sued to recover damages for alleged deprivation of the fishing rights reserved to them under article 4 of their 1855 treaty (12 Stat. 1939) with

5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinion in the *McCoy* case, *supra*, and Judge Finley's concurring opinion in *State v. Satiacum*, 50 Wn.2d 535, *et seq.*, 314 P.2d 400 *et seq.* (1957).

the United States. The Court of Claims held that the government's regulations restricting the rights of the Makahs to fish for halibut did not amount to a breach of the treaty. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477 (1959); affirmed 151 Ct. Cl. Rep. 701 (1960); *cert. denied* 365 U.S. 879, 6 L. Ed.2d 191, 81 Sup. Ct. 1028 (1961).

The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, *supra*, as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be "indispensable" to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at "usual and accustomed grounds and stations."

The word "indispensable" is taken from *Tulee v. Washington*, *supra*, where the Supreme Court of the United States struck down a requirement for a fishing license as applied to treaty Indians.

Viewing the treaty in this light, we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not *indispensable to the effectiveness of a state conservation program*. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. (Italics ours)

It was the exaction of a fee for fishing which could not be reconciled with a fair construction of the treaty.

All would agree that the imposition of license fees is not indispensable to the effectiveness of a state conservation program, but such a holding is not supporting authority for the proposition that any regulation that the state adopts must be indispensable to the success of its conservation program before that regulation is applicable to treaty Indians. We are convinced that the Supreme Court did not set up such an impossible standard in *Tulee*, nor did it intend to. The real holding in that case is

[T]hat, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Tulee and other Supreme Court decisions recognize that the state must have the necessary power of appropriate regulation to preserve a resource for the benefit of all of the people of the state. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L. Ed. 1166, 36 Sup. Ct. 705 (1916); *United States v. Winans*, *supra*.

We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.

It would make the competent exercise of the state's inherent power of preservation an impossibility. In *New York ex rel. Kennedy v. Becker*, *supra*, the United States Supreme Court discussed the reserved rights of the Seneca Indians to fish in the waters on land ceded by them to Robert Morris by the treaty of the "Big Tree" of September 15, 1797⁶ (7 Stat. 601). Mr. Justice Hughes,

6. Ratified by the Senate on April 11, 1798, and proclaimed by the President.

in an opinion adopted by the court after his resignation in 1916, said:

It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other, at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But, the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring

to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." (pp. 563, 564)

Attention is particularly directed to the quotation from *United States v. Winans*, *supra*, at the end of the foregoing quotation.

In summary: We have rejected the Departments' argument that the Indian treaties are of no force and effect and that the state may repudiate them at will.

We have ruled that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe, and that the tribe continues to exist, at least so long as it is recognized as such by the appropriate agencies of the United States, or until Congress passes a termination act.

We have agreed with the trial court that there is no longer a Puyallup Indian Reservation, and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation; however, we hold that they continue to have a right to fish at usual and accustomed grounds and stations and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fishery.

The state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.

We are, therefore, in accord with the conclusion of the trial court that an injunction should be entered in this case; however, the injunction entered by the trial court is much too broad. It permanently enjoins individual de-

defendants and members of the federal organization known as the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington. It is predicated on the trial court's determination that the defendants have no treaty rights.

The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

The essence of this opinion is—and the decree, as re-framed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes, or a regulation or regulations promulgated thereunder, and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction.

The judgment and decree appealed from is set aside, and the cause is remanded for the purposes indicated in this opinion.

Neither the appellants nor the respondents having prevailed to the full extent of their claims, each will bear its own costs on this appeal.

FINLEY, C. J., WEAVER, and [^]HAMILTON, J. J., and
LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—I concur in the result reached in the majority opinion in so far as it holds that appellants in this case do have treaty rights and have standing to assert those rights in this suit, but I do not agree that the test of their right to fish is dependent on the existence or nonexistence of a state statute or regulation which has been held by the trial court to be reasonable and necessary for the conservation of fish.

I would reverse the trial court's degree of permanent injunction with directions to dismiss the action for any one or all of the three reasons stated below.

I.

I am of the opinion that:

(1) The provisions of article 3 of the Treaty of Medicine Creek are presently the supreme law of the land and are superior to the exercise of the state's police power respecting the regulation of fishing by Indians at places where the treaty is applicable.

(2) If the Secretary of the Interior and the Commissioner of Indian Affairs have adopted the proposed rules relating to off-reservation fishing by treaty Indians, the Federal Government has assumed control of the matters in controversy in this case, and state courts may not enjoin appellants from fishing in the Puyallup River. See 30 Fed. Reg. 8969.

(3) Assuming, arguendo, that the trial court had power to enjoin such fishing, the findings of fact do not support the conclusions of law or the permanent injunction entered by it. In my opinion, this statement is correct regardless of whether the "indispensable" test or the "reasonable and necessary" test be applied.

My views on the rights of treaty Indians to fish "at all usual and accustomed grounds and stations" are stated at some length in the first opinion (signed by four judges)

in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), and in my dissenting opinion in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). See the decisions of the courts of last resort quoted and discussed therein.

In the interest of brevity, I incorporate those two opinions herein by reference as a part of this opinion. In those opinions, it was stated that, under the federal constitution, the treaty was the supreme law of the land and would continue to be until:

(1) the treaty is modified or abrogated by act of Congress, or

(2) the treaty is voluntarily abandoned by the Puyallup tribe, or

(3) the supreme court of the United States reverses or modifies our decision in this case. (at 529)

In the last 9 years since the two *Satiacum* decisions were filed none of these events have taken place. Nor have respondents sought a final solution of the problem through any branch of the United States Government—legislative, executive, or the Supreme Court.

II.

In the case at bar, the United States has for the first time appeared in this court and filed a brief as *amicus curiae*. Its counsel participated in the oral argument.

The United States contends in its brief that the trial court's permanent injunction fails to give *any* recognition to the rights secured to the Indians by article 3 of the Treaty of Medicine Creek. After citing cases relating to this contention, the government's brief states:

... It is enough at this point to note that the permanent injunction against fishing in the instant case, except in accordance with the regulations applicable to all, absolutely ignores the treaty-reserved rights of these Indians. Conclusion of Law IV, *supra*, is plainly contrary to *Tulee*. For this reason alone, the judgment and decree must be reversed.

It is further argued therein that the scope of the treaty-reserved rights of the Indians may best be determined by a federal authority. The reasons supporting this argument are stated as follows:

We must start with the established principle that interpretation of a treaty with an Indian tribe, like a treaty with a foreign nation, presents a federal question. *Worcester v. Georgia*, 6 Pet. 515 (1832). Had the Treaty itself, or Congress in contemporary or subsequent legislation, more specifically defined the right reserved or regulated how it was to be exercised (which would be another way of defining its scope), there would be no problem today. For, clearly, the federal statute would prevail, and no state law or regulation could impinge upon the Indians' exercise of the right as defined or regulated. See *Missouri v. Holland*, 252 U.S. 416 (1920), where the Supreme Court rejected the argument that implementing legislation pursuant to a treaty interfered with exercise of state regulatory provisions as to wildlife.

The brief then states that, pursuant to congressional action, the Secretary of the Interior and the Commissioner of Indian Affairs have proposed the adoption of certain rules relating to off-reservation treaty fishing which have been published in 30 Fed. Reg. 8969. The proposed rules were signed by the Under Secretary of the Interior on July 5, 1965. Whether they have yet been officially adopted, we are not advised.

I mention the government's amicus curiae brief at some length because this is the first indication we have had of what the government's legal or administrative position is in regard to the status of the Treaty of Medicine Creek or to a departmental solution of the problems heretofore presented to this court concerning the off-reservation fishing rights of treaty Indians.

Thus, we now have official information that the legal representatives of the government take the position that an Indian treaty is the same as a treaty with a foreign nation. I presume that this means that an Indian treaty

under the Supremacy Clause of the United States Constitution is the supreme law of the land. Cf. first opinion in *State v. Satiacum*, *supra*, and cases cited therein. We are also assured that the Interior Department is proposing to take some action regarding the regulation of off-reservation fishing by treaty Indians.

III.

I desire to point out that I disagree with the majority's discussion of the holding of the Court of Appeals in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), where that court said, at 172:

That, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up, and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food.

After discussing certain testimony presented by the Oregon officials, the Court of Appeals concluded:

However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [*Tulee v. Washington, supra*], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), *aff'd*, 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The word "indispensable" is said by the majority not to be supported by the two cases cited by the Court of Appeals, to wit, *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 Sup. Ct. 862, and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). However, the United States Supreme Court denied the state of Oregon's petition for certiorari in the *Maison* case (375 U.S. 829, 11 L.Ed.2d 60, 84 Sup. Ct. 73).

While the denial of certiorari is not to be considered as an expression of approval of the lower court's decision, the *Maison* case involved the interpretation of a treaty which under the Supremacy Clause of the United States Constitution is the supreme law of the land, and hence

could be authoritatively interpreted only by the United States Supreme Court. If the word "indispensable," in the context in which the court of appeals used it in the *Maison* case, substantially changed the meaning of the treaty as to the state's power of regulation of Indian fishing rights, one would suppose that, in view of the many conflicting decisions of various state and federal courts on this vital subject, the Supreme Court would have granted certiorari.⁷

The *Maison* decision was followed by Judge Solomon sitting in the United States District Court for the District of Oregon in *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, — F. Supp. — (decided August 8, 1936). This case involved the right of treaty Indians to hunt game. The language of the treaty involved was similar to the treaty in the case now before us. In upholding the Indians' right under the treaty to hunt game, Judge Solomon said:

In *Confederated Tribes of the Umatilla Indian Reservation v. Maison, et al.*, 186 F. Supp. 519, 520, I construed this article to mean that the State may not restrict the off-reservation fishing rights, set forth in the treaty without showing that such restriction was necessary for conservation of the fish. The Court of Appeals in affirming this decision laid down the test to be applied to State-imposed restrictions of treaty rights:

"... while a restriction of the fishing activities of the plaintiffs must be *indispensable*, . . . a restriction of the fishing activities of other citizens is valid if merely *reasonable* . . ." (314 F.2d 169, 174 emphasis is original).

In other words, defendants here contend that in spite of the provisions of the treaty, the Indians have no greater rights to fish and hunt off their reservation

7. This is the second time that the United States Supreme Court has failed to grant a petition for certiorari which sought an authoritative ruling on the status of an Indian treaty with respect to state police power. See discussion of *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), found in *State v. Satiacum*, 50 Wn.2d at pages 525-529.

than any other Oregon citizen. This contention was made and rejected in *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

...
No one disagrees with the defendants' argument that regulation of fish and game resources is necessary and desirable, and that an intolerable situation would arise if all citizens were permitted to fish or hunt without restriction. However, the issue here is whether a State is permitted to proscribe or limit the treaty rights of Indians without showing that such restriction is indispensable. *Confederated Tribes, supra*.

Until the Supreme Court holds that the term "indispensable" is not the correct test to be used in determining the validity of state laws and regulations vis-a-vis the fishing rights of treaty Indians, I think that this court should not read the word out of the *Maison* decision and substitute "reasonable and necessary" therefor.

Even if the rule approved by the majority decision in the case at bar is followed (i.e. that the state has the burden of proving that its regulations are reasonable and necessary to conserve the fishery), I see no need for a further hearing.

The trial court stated in its memorandum decision that the total amount of salmon caught by Indians in the entire state in 1964 was only between 3 per cent and 5 per cent of the total number taken by Indians and non-Indians.

The trial court found the facts as to the fishing activities of appellants to be:

XIII. That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the

anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

XIV. The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

XV. The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

XVI. That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

XVII. That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.

XVIII. It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

The ultimate finding of fact is that the fishing activities of appellants, if not restrained, *could* result in the destruction or serious impairment of the anadromous fish runs on the Puyallup River.

The above quoted findings do not, in my opinion, support the conclusion that:

It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

Neither do they justify the entry of the trial court's judgment and decree which contained the following injunctive provision:

It is hereby Ordered, Adjudged, and Decreed That:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

I agree with the following statement made in the brief of the amici curiae Association on American Indian Affairs, Inc., as to the effect of the trial court's permanent injunction quoted above wherein it is said:

The decision below concerning the purported non-existence of the Puyallup Tribe today is novel, wholly contrary to, well-established principles of Indian law, and completely at odds with sound public policy. In the first place, only Congress, and clearly not the State courts, has power to effect the termination of tribal status. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. McGowan*, 302 U.S. 535, 538 (1938); *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Sandoval*, 231 U.S. 28 (1913). Indeed, the rule that sole responsibility for declaring when tribal existence has ended is vested in Congress has particular pertinence in this case where withdrawal of recognition from the Puyallup Tribe (at least in the view of the lower court) effectively would abrogate a solemn treaty commitment of the United States.

As indicated above, I likewise agree with the closing statement in the brief of the amicus curiae Association of Indian Affairs, Inc., which states:

The Superior Court's Findings of Fact and Conclusions of Law clearly fail to measure up to this standard. Neither the findings nor the memorandum deal

with the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing or by other means not having an impact upon appellants. Similarly, the court below appears not to have considered whether preservation of the Puyallup River fishery, assuming the need for regulation, requires so severe a curtailment of Indian fishing as the respondents here seek to impose. Such disregard for the applicable law, particularly as enunciated by the United States Court of Appeals for this Circuit, cannot be allowed to stand.

In summary, unlike their non-Indian fellow-citizens, enrolled members of the Puyallup Tribe have a vested property right under the Treaty of Medicine Creek to fish at all usual and accustomed places outside their reservation. This off-reservation right to take fish, so essential to the Indians' very existence, is protected under Federal law, and, at the very least, may be limited by State law only under extraordinary circumstances. As a matter of law, the Washington conservation statutes and regulations may not be enforced against Indian treaty fishing rights in the same manner as they are against the bare fishing privileges of other persons. In the former situation, unlike the latter, the State of Washington has the burden of proving affirmatively that application to appellants of the attempted regulations is indispensable to the conservation of the fish resource and the task of further proving that the desired conservation goals cannot be achieved in some other fashion. Respondents made no such showing in the lower court.

Unless it be held that Indian treaties are not treaties within the meaning of the Supremacy Clause of the United States Constitution and hence are not the supreme law of the land and do not override the police power of the states (contrary to the holding of the Supreme Court, cited below),⁸ I can only reach the conclusion that the judgment and decree of the trial court should be reversed with directions to dismiss the action.

8. See cases discussed in the first *Satiacum* opinion (50 Wn.2d at pages 516-519).

In *State v. Quigley*, 52 Wn.2d 234, 324 P.2d 827 (1958), a case in

I am further of the opinion that respondents have failed to prove either that the state laws and regulations here involved are *either* indispensable or reasonably necessary to the conservation of salmon fishery on the Puyallup River and hence would reverse and dismiss for that reason.

HUNTER, J. (dissenting)—I dissent. The ultimate holding of the majority is that the Puyallup Indians are subject to *regulations reasonable and necessary* for the preservation of the fishery. The majority's modification of the trial court's injunction when read with this holding is not consistent. The trial court properly applied our existing conservation laws to the Puyallup Indians by its injunction. The power of the state of Washington to regulate fishing for purposes of conservation has been clearly recognized as applying to the Indians *equally with others* by the United States Supreme Court in the case of *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941). In this case Justice Black for the court stated:

We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while *the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here. (Italics mine.)

Our present laws and regulations relating to the use of gear, and the time and place of taking fish are for no other purpose than the reasonable and necessary preservation of the fishery. These laws and regulations accomplish the purpose of the ultimate holding of the majority and there-

which a non-treaty Indian claimed the right to hunt deer on his own property without a hunting license, this court, in a unanimous en banc opinion concluded with this dictum: "Of course, a treaty takes precedence over a state law, but appellant has no treaty rights that restrict the state in its exercise of the police power. Our question, therefore, must be answered in the affirmative."

fore should have been imposed on the Indians *equally with others* as was done by the trial court.

In my opinion the ultimate holding of the majority is consistent with the injunction entered by the trial court, and there is no need for its modification.

ROSELLINI and HALE, JJ., concur with HUNTER, J.

HALE, J. (concurring in the dissent)—I agree with and have signed Judge Hunter's dissenting opinion. As a preface to further comment, it should be noted that this case has nothing to do with protecting or preserving for the Indians any rights in land or personal property or fostering their management of business or tribal affairs. It involves only the claims of a right to fish in places where all others are forbidden.

Appellants assert the right under a treaty to violate the laws of a sovereign state, laws designed to preserve, protect and develop a great natural resource that contributes vastly to the economic and recreational welfare of millions of its citizens. Appellants claim powers which, if exercised in full, will inevitably destroy this resource in the Puyallup River.

I find no language in the Treaty of Medicine Creek (10 Stat. 1132) concluded December 26, 1854, by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of the Territory of Washington, on behalf of the United States and the "chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians,"⁹ warranting the conclusion that the Indians should be forever immune from the state's game and fishery laws. The most cogent language of the treaty, that particular phraseology designed to prevent unfair and invidious discrimination against the Indians and which vouchsafed to them the right to hunt and fish, granted these very rights *in common with all citizens of the territory*. See Treaty with Nisqualli, Puyallup, Etc., 1854, art. 3, 2 Indian Affairs, Laws and Treaties 496 (1902). As I would permit no discrimination against the

9. 2 Indian Affairs, Laws and Treaties 495 (1902).

descendants of the Puyallups, I would allow no discrimination in their favor either.

In my opinion, most of the decisional law written about Indian treaties, although intended to protect the American Indian in the rights to property and the pursuit of happiness, has had a contrary effect. Decisions relating to Indian treaties begin with the hope of protecting the Indian, and inevitably end by treating the Indians as aborigines, and in doing so not only have tended to degrade the Indian and perpetuate the stigma of second-class citizenship earlier surrounding him but blinded this country to the need for legislation which will genuinely rehabilitate our Indian citizens and enable them to play a full and active role in the affairs of this state and country in common with all citizens of whatever racial origin.

The majority decision fosters an illusion that somehow by regarding the Treaty of 1854 as a device to confer upon shareholder members in appellant, The Puyallup Tribe, Inc., special privileges, immunities and emoluments not shared equally with descendants of the white settlers of 1854 or the citizenry at large, the courts are righting a wrong long suffered by the Indians.

But while intending otherwise, the opinion discriminates in favor of the Indians, granting to a few of them special favors, privileges and immunities not claimed or shared by other Indians, and perpetuating the idea that a treaty with the natives in 1854 is a viable compact with their remote descendants. In holding thus, the decision again delays the day when some descendants of the Puyallups will achieve full responsibility as citizens. I would put an end to such an invidious and discriminatory concept, and read the treaty as it was written.

Next, on the question of tribal existence, I think the evidence establishes and the learned trial judge rightly found that appellant, The Puyallup Tribe, Inc., never acquired nor now has any rights under the treaty. I believe that the tribe or band which signed the Treaty of Medicine Creek of 1854 has long since disappeared, its

lands sold and descendants absorbed into the body politic and that the conclusion of the learned trial judge that

There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

is well supported by both the history of the tribe and the evidence in the case. This finding and the judgment should be affirmed.

A-67

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

Remittitur
No. 38611

Pierce

County
No. 158069

DEPARTMENT OF GAME of the State of
Washington and the DEPARTMENT OF
FISHERIES of the State of Washington,
Respondents,

v.

THE PUYALLUP TRIBE, INC., a corporation,
et al.,
Appellants.

The State of Washington to: The Superior Court of the
State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court
of the State of Washington filed on January 12, 1967, be-
came the final judgment of this court in the above entitled
case on March 13, 1967. This cause is remitted to the
superior court from which the appeal was taken for furth-
er proceedings in accordance with the attached certified
copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as
follows:

No cost bill having been filed, costs are deemed waived.

cc: Court Reporter
Mr. Arthur Knodel
Mr. Malcolm McLeod
Hon. John J. O'Connell
Mr. Joseph L. Coniff
Mr. Mike Johnston

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Court at Olympia, this
15th day of March, A.D. 1967.

WILLIAM M. LOWRY, *Clerk of the Supreme Court,*
State of Washington.

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE COUNTY OF
PIERCE

No. 158069

Amended
Injunction

DEPARTMENT OF GAME of the State of
Washington and the DEPARTMENT OF
FISHERIES of the State of Washington,
Plaintiffs,

v.

THE PUYALLUP TRIBE, INC., a
Federal Organization, *et al.,*
Defendants.

This matter having come on regular for hearing before this court upon the motion of plaintiffs and defendants to amend the permanent injunction heretofore entered by this court, the plaintiffs and defendants being represented by counsel, and the court being fully advised; now therefore,

IT is hereby ordered, adjudged, and decreed that:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

DONE IN OPEN COURT this 2nd day of June, 1967.
John D. Cochran, *Judge of the Superior Court*

Presented by:

J. L. Coniff,
Special Assistant Attorney General
Of Counsel for Plaintiffs.

APPENDIX C

CONFLICTING OPINIONS

H. G. MAISON, Individually and as Superintendent, Dept.
of State Police of the State of Oregon, *et al.*,
Appellants,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN
RESERVATION, *et al.*, *Appellees*.

No. 17139

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Feb. 15, 1963.

Robert Y. Thornton, Atty. Gen. of Oregon, Arthur G.
Higgs and Roy C. Atchison, Asst. Attys. Gen., Salem,
Or., for appellant.

Frank E. Nash, Mark C. McClanahan, King, Miller,
Anderson, Nash & Yerke, Portland, Or., for appellees.

Before HAMLIN, Merrill and KOELSCH, Circuit
Judges.

KOELSCH, Circuit Judge.

This case involves fishing rights of the Confederated
Tribes of the Walla Walla, Cayuse and Umatilla Indians
under a treaty with the United States.

[1] The District Court had jurisdiction under the pro-
visions of 28 U.S.C. § 1331, relating to federal ques-
tions, and 28 U.S.C. § 2201, the Federal Declaratory
Judgments Act. The provisions of 28 U.S.C. § 2281, re-
quiring a three-judge court are not applicable and trial
was properly had before a single judge.¹ Jurisdiction is

1. 28 U.S.C. § 2281 provides that where an injunction is sought
restraining the enforcement or execution of a state statute or an order
of an administrative agency acting thereunder, upon the ground of
the unconstitutionality of such statute, the matter must be determined
by a district court composed of three judges. But that provision has
no application to this litigation, for the issue is not whether a statute
of the State of Oregon or a regulation of its Game Commission is
unconstitutional; rather, the issue is whether statutes and regulations,
admittedly valid, can be applied to these plaintiffs. See *Phillips v. United
States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941).

conferred upon this court under the provisions of 28 U.S.C. § 1291.

It appears that late in May of 1855 a joint council was held at Camp Stevens in the Walla Walla Valley of the State of Washington between representatives of the United States and certain Indian tribes of Washington and Oregon. At that council the plaintiffs' ancestors were persuaded to accept a treaty containing the following provision:

*"Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them."*²

The controversy here concerns that portion of the treaty provision which relates to the Indians' right to fish outside their reservation "in common with citizens of the United States."

In 1958 the Oregon State Game Commission promulgated regulations prohibiting fishing on tributaries of the Columbia and Snake Rivers during part of the year. Shortly thereafter, the Commission caused three Indians to be arrested for fishing during the closed season in certain Blue Mountain streams that run into the Columbia. It further threatened to have arrested any members of the Confederated Tribes who fished contrary to the laws and regulations of Oregon.

Contending that the state's restriction of their fishing activities was contrary to the rights guaranteed them by treaty, the Confederated Tribes and several of its tribesmen sought a declaratory judgment and injunction. The court's judgment was generally favorable to the Indians:

"Ordered, Adjudged, and Decreed that the Confed-

2. Treaty with the Walla Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, Art. 1, 12 Stat. 945.

erated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake Rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha River systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto."

Although the court declined to issue an injunction, it retained jurisdiction to grant such relief. The defendants have appealed.³

The extent of Indian fishing rights under a treaty between the United States and the Yakima Indians was in issue in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The court observed that prior to the treaty the Indians had unlimited fishing rights:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381, 25 S.Ct. 664.

Explaining the effect of the treaty upon those rights, the court continued:

"New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." (Emphasis added.) *Ibid.*

The treaty involved in the instant case is substantially similar to the Yakimas' treaty and was negotiated at the

3. The trial court's opinion is reported at D.C., 186 F. Supp. 519.

same common council. Thus, the Supreme Court's analysis applies equally here. We hold that the plaintiffs' treaty reserves to them those unimpeded fishing rights which their ancestors had long enjoyed before the treaty, subject only to the qualifications contained within that document. But, the question remains, what are those qualifications?

One of them was pointed out in the *Winans* case. There it was stated that, because of the provision that the Indians were to fish "in common with citizens," the Indians had not retained an exclusive right to fish at their usual and accustomed stations. Citizens might share it.⁴ *United States v. Winans, supra* at 381.

Another of the qualifications was explained in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). In the former case it appears that one Tulee, an Indian, was convicted of catching salmon without a license required by a statute of the State of Washington. Tulee claimed the protection of the same treaty that was involved in the *Winans* case, arguing that it gave him a right to fish without restriction "at all usual and accustomed places" within the ceded area. The State countered with the argument that, because of the phrase "in common with citizens" the appellant's rights were no greater than those of other citizens. The court did not wholly approve either contention, but said:

"We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here." (Emphasis added.) *Tulee v. Washington, supra*, 315 U.S. at 684, 62 S.Ct. at 864.

4. Of course, this does not mean that a state cannot, by reasonable laws and regulations, exclude from fishing those of its citizens who are not parties to the treaty.

We applied the doctrine of the *Tulee* case in *Makah*. In that case the State of Washington had, by regulation, prohibited the catching of fish in the Hoko River except with a certain type of gear. As justification for the application of its regulation to the Indians, the State argued that the provision in the Makah Indians' treaty granting to them the right to fish "in common with all citizens" meant that the rights of the Indians were the same, and no greater, than those possessed by other citizens. However, rejecting that argument, we said: "The Supreme Court held in the *Tulee* case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary' * * *." *Makah Indian Tribe v. Schoettler*, *supra*, 192 F.2d at 226.

Thus, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up and they

are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food. In support of that contention they cite the testimony of three expert witnesses; namely, Robert N. Thompson, a fishery biologist of the Fish Commission of Oregon, Richard T. Pressey, Supervisor of Research for the Department of Fisheries of the State of Washington, and Dr. H. John Rayner, Chief of the Wildlife Research Division of the Oregon State Game Commission.

Thompson's testimony, to the effect that unrestricted fishing of sufficient industry could exhaust the spawning beds, is a proposition about which there can be no quarrel. However, he did not relate that proposition to the facts of this case, but, on the contrary, testified that the plaintiffs have never shown a disposition to fish with marked intensity.

Pressey testified that commercial fishing by Indians on spawning grounds in the State of Washington had seriously reduced some runs; further, that the taking of fish by the plaintiffs for their own subsistence would have a similar, although not as serious, effect. However, the trial court was not bound to accept this testimony. It was largely based upon the reports of an interested party; furthermore, the witness acknowledged that the number of fish had been increasing in the Blue Mountain streams in recent years and that, in the absence of depletion, there would be no need for regulation.

Dr. Rayner testified that the taking of fish from the spawning grounds creates an "unhealthy situation," that it is inconsistent with "efficient conservation methods," that "indiscriminate" fishing endangers the fish life of a stream, and that fish "must be protected" in their spawning beds. These statements are ambiguous and vague, but even if they reflected an opinion of the witness that restriction of plaintiffs' fishing was necessary for con-

servation, nevertheless, that opinion was not binding on the trial court.

In Dr. Rayner's view, "conservation" is a term which involves a compromise of the competing interests of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by "conservation," the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word "conservation" in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, "I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether."

[2] Such a statement is not evidence of that "necessity for conservation" required by the *Tulee* case. In that case the Supreme Court held that a regulation, to be necessary, must be "indispensable" to the effectiveness of a state conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others. Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society.

[3, 4] But even if the trial judge disregarded the many deficiencies and contradictions in the experts' testimony and attributed to that testimony some probative value on the issue of necessity, nevertheless, his decision that the defendants failed to sustain their burden of proof on that issue must be upheld. The trier of fact is not bound to adopt the conclusion of experts where it is contrary to his best judgment. *United States v. Hill*, 62 F.2d 1022 (8th Cir. 1933); *Tracy v. Commissioner*, 53 F.2d 575 (6th Cir. 1931), cert. denied, 287 U.S. 632, 53 S.Ct. 83, 77 L.Ed. 548 (1932). The trial judge could justifiably doubt the validity of the experts' conclusions.

in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining.⁵

Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing.

In its opinion the trial court stated:

"Although the closure of streams during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods of attaining the same objectives."⁶

It is apparent from this that the judgment not only was grounded upon a finding that no restriction of plaintiffs' fishing was necessary, but also, upon a finding that if it was necessary, the laws and regulations specifically involved in this case could not be imposed.

But the defendants argue that none of the alternative conservation measures specifically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the treaty.

[5, 6] However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights

5. In 1855 there were approximately 1500 Indians in the Confederated Tribes; at the time of the trial they numbered only about 1200.

6. Confederated Tribes of the Umatilla Indian Reservation v. Maison, 186 F. Supp. 519, 520-521 (D.Or.1960).

to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [*Tulee v. Washington*, *supra*], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Oré. 1931), *aff'd* 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The judgment is affirmed.

[No. 33545. *En Banc*. July 1, 1957]

THE STATE OF WASHINGTON, *Appellant*, v. ROBERT SATIACUM, *et al.*, *Respondents*.¹

Appeal from a judgment of the Superior Court for Pierce County, No. 32128, Soule, J., entered October 20, 1955, dismissing a prosecution for illegal fishing. Affirmed.

John J. O'Connell, John A. Petrich, Keith D. McGoffin, and John G. McCutcheon, for appellant.

Malcom Stewart McLeod and Wing C. Luke, for respondents.

John J. O'Connell, Joseph T. Mijich, Nathan G. Richardson, Arthur Lazarus, Jr., and Theodore H. Little, *amici curiae*.

DONWORTH, J.—The only question presented on this appeal involves the right of defendants, who are Puyallup Indians, to fish on the Puyallup River during the closed season (1) within the exterior boundaries of the original Puyallup Indian reservation, and (2) "at all usual and

1. Reported in 314 P.2d 400.

accustomed fishing grounds and stations" under the treaty of Medicine Creek of 1855. 10 Stat. 1132.

Defendants were jointly charged by amended complaint in justice court with five counts of illegal fishing, alleged to have occurred on November 10 and 11, 1954, on the Puyallup River in Pierce County.

The acts alleged to be contrary to statute were (1) use of a net for the purpose of catching food fish (salmon), contrary to the provisions of R.C.W. 75.12.060; (2) use of a net for the purpose of catching game fish (steelhead), contrary to the provisions of R.C.W. 77.16.060; (3) possession of game fish during the closed season, contrary to the provisions of R.C.W. 77.16.030 and rules and regulations promulgated by the state game commission under authority of R.C.W. 77.12.010 *et seq.*; and (4) possession of food fish during the closed season, contrary to rules and regulations promulgated by the director of fisheries under authority of R.C.W. 75.08.010 *et seq.*

After trial in justice court, James Young was found guilty on four counts, and Robert Satiacum was found guilty on two counts. They appealed to the Superior Court of Pierce County, and following a trial *de novo*, the court entered a judgment of dismissal, stating, in part, as follows:

"IT IS ORDERED, ADJUDGED and DECREED that the within cause be and hereby is dismissed as to each count for want of sufficient evidence, it appearing from the oral stipulation herein that the defendants are Puyallup Indians, that they claim fishing rights under the Treaty of Medicine Creek of 1855, and that the acts herein took place at a usual and accustomed fishing ground of the Puyallup Indians, and the State having failed to introduce any evidence that as to Puyallup Indians the statutes and regulations herein involved were reasonable and necessary for the conservation of fish."

Briefly stated, the events which led to the arrest of respondents are as follows:

On November 10, 1954, law enforcement officers ob-

served James Young tending two fixed nets located on the Puyallup River within the city limits of Tacoma. The law enforcement officers testified that on that date Mr. Young had two salmon in his possession, but they did not arrest him.

On November 11, 1954, these same officers observed both defendants on the same location tending the two nets. The officers testified that defendants had three steel-head fish in their possession on this date, at which time defendants were arrested.

The parties stipulated that there is in full force and effect the treaty of Medicine Creek of 1855, a valid treaty between the Medicine Creek tribes and the United States; that the Puyallup Indian tribe is one of the Medicine Creek tribes and a signator to the treaty of 1855; that the defendants in this action are descendants of the original Puyallup tribe of Indians and are presently on the rolls of the Puyallup tribe of Indians, a tribe recognized by the secretary of the interior and the bureau of Indian affairs as a regular, organized Indian tribe under the Wheeler-Howard act of 1934, as amended (25 U.S.C. §§ 461-479); that the "lower river net" was located inside the original Puyallup Indian reservation, established by treaty with the United States, but that the land on each side of the river had been alienated by the Puyallup Indians; and that the "upper river net" was at a usual and accustomed fishing ground of the Puyallup tribe of Indians, as defined by the treaty.

In dismissing the cause, the trial court based its decision upon the recent case of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (C.A. 9th), wherein it was held that the state of Washington had failed to sustain the burden of proving that the regulation there in question was reasonable and necessary for the conservation of fish.

The state has appealed from the trial court's dismissal of the charges. Its sole assignment of error is directed to

"The dismissal of the case as to each count for want of sufficient evidence as to the reasonableness and necessity of the statutes and regulations involved for the conservation of fish."

Respondents contend that, while the *Makah* case is authority for sustaining the judgment of the trial court, the real issue presented for decision is whether the police power of the state, as expressed in the statutes above referred to, can impair the rights guaranteed to the Indians under the treaty of She-Nah-Nam or Medicine Creek of 1855.

This treaty is one of several treaties entered into by Territorial Governor Isaac I. Stevens, as representative of the United States; and the Indian tribes in the Washington territory following its creation. As a result of the Medicine Creek treaty, a vast territory was "ceded" to the United States by the Indians, and a small tract of land extending inward from the mouth of the Puyallup River was retained by the Indians as a reservation.

Article III of the treaty provides as follows:

"The right of taking fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens of the Territory*, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: . . ." (*Italics ours.*) 10 Stat. 1132.

Since our decision in this case turns upon the proper construction of this article of the treaty, and since the supreme court of the United States is the only tribunal having the power to interpret authoritatively the United States constitution and treaties made thereunder, we find it necessary to review its decisions relating to the construction of Indian treaties.

All Indian treaties entered into prior to 1871 were consummated pursuant to Art. II, § 2 of the United States constitution. Article VI, commonly referred to as the "supremacy clause," provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and*

the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." (Italics ours.)

The supreme court has consistently held that Indian treaties have the same force and effect as treaties with foreign nations, and consequently are the supreme law of the land and are binding upon state courts and state legislatures notwithstanding state laws to the contrary. *Cherokee Nation v. Georgia*, 5 Pet. (U.S.) 1, 8 L.Ed. 25; *Worcester v. Georgia*, 6 Pet. (U.S.) 515, 8 L.Ed. 483; *Blue Jacket v. Johnson County Commissioners (Kansas Indians)*, 5 Wall. (U.S.) 737, 18 L.Ed. 667; *Holden v. Joy*, 17 Wall. (U.S.) 211, 21 L.Ed. 523; *United States v. New York Indians*, 173 U.S. 464, 43 L.Ed. 769, 19 S.Ct. 487; *Jones v. Meehan*, 175 U.S. 1, 44 L.Ed. 49, 20 S.Ct. 1; *Choctaw Nation v. United States*, 179 U.S. 494, 45 L.Ed. 291, 21 S.Ct. 149; *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 S.Ct. 662. See, also, 4 A.L.R. 1380, 134 A.L.R. 882-888, 11 Am. Jur. 650, § 43, 27 Am. Jur. 548, § 10.

In the *Worcester* case, *supra*, the state of Georgia had attempted to prosecute a missionary who had gone upon the Cherokee Indian reservation with the permission of the tribal council, but contrary to a state statute. The supreme court, speaking through Chief Justice Marshall, stated, in part, as follows:

"The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. *The very term 'nation,' so generally applied to them, means 'a people distinct from others.'* The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank

among those powers who are capable of making treaties. The words 'treaty' and 'nation,' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. *We have applied them to Indians, as we have applied them to the other nations of the earth;* they are applied to all in the same sense." (Italics ours.)

The statute was held void, since it conflicted with the Cherokee Indian treaty, which was declared to be the supreme law of the land.

In the case of *Missouri v. Holland*, 252 U.S. 416, 64 L.Ed. 641, 40 S.Ct. 382, 11 A.L.R. 984, the supreme court construed a treaty between the United States and Great Britain which had been executed in an effort by the two nations to conserve migratory waterfowl known to traverse many parts of the United States and Canada in their annual migrations. Subsequently, Congress had enacted the migratory bird treaty act of July 3, 1918, and the state brought a bill in equity to prevent a United States game warden from attempting to enforce the statute and regulations made pursuant thereto. The argument was advanced by the state of Missouri that the treaty infringed upon the constitution, was void as an interference with the rights reserved to the states by the tenth amendment, and that the acts of the United States, pursuant to the treaty, invaded the sovereign and plenary right of the state to regulate and conserve wildlife and contravened its will manifested in statutes. The supreme court, speaking through Justice Holmes, stated:

"To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. . . .

"As most of the laws of the United States are carried out within the States and as many of them deal with

matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. *Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.'*

"We are of opinion that the treaty and statute must be upheld." [Citing case.] (*Italics ours.*)

(The statute referred to was the act of Congress passed to implement the treaty.)

In the case of *Asakura v. Seattle*, 265 U.S. 332, 68 L.Ed. 1041, 44 S.Ct. 515, the supreme court construed a treaty with Japan, and stated:

"A treaty made under the authority of the United States 'shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.' Constitution, Art. VI, § 2.

"The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy v. Riggs*, 133 U.S. 258, 266, 267; *In re Ross*, 140 U.S. 453, 463; *Missouri v. Holland*, 252 U.S. 416. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. *The treaty is binding within the State of Washington.* [Citing case.] The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. *It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.* It operates of itself without the aid of any legislation, state or national; and

it will be applied and given authoritative effect by the courts. [Citing cases.] (Italics ours.)

A Seattle municipal ordinance, which purported to prevent citizens of Japan from engaging in the pawnbroking business, was held invalid, since it conflicted with the Japanese treaty.

In the case of *Nielsen v. Johnson*, 279 U.S. 47, 73 L.Ed. 607, 49 S.Ct. 223, the supreme court construed a treaty with Denmark and stated:

"Treaties are to be liberally construed so as to effect the apparent intention of the parties. [Citing cases.] When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, [citing cases] and as the treaty-making power is independent of and superior to the legislative power of the states, *the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments.*" (Italics ours.)

The court held invalid an Iowa inheritance tax statute, which purported to levy a discriminatory tax on property inherited by a citizen of Denmark, because it violated the treaty provisions.

All Indian treaties are construed by the courts in favor of the Indians, in an endeavor to exercise toward them the highest degree of good faith, because of the dominant position of the United States. *Worcester v. Georgia*, *supra*; *Holden v. Joy*, *supra*; *Jones v. Meehan*, *supra*; *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109; *United States v. Winans*, *supra*; *Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L.Ed. 555, 39 S.Ct. 203; *United States v. Shoshone Tribe*, 304 U.S. 111, 82 L.Ed. 1213, 58 S.Ct. 794; *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 S.Ct. 862; *State v. Arthur*, 74 Ida. 251, 261 P.2d 135; *State v. McClure*, 127 Mont. 534, 268 P.2d 629.

[1] Keeping in mind the rules of construction hereto-

fore cited, and after reading and analyzing the above cited cases, and many others dealing with Indian treaties in relation to state legislation enacted under the police power, we have reached the conclusion that the better reasoned cases have held state legislation invalid as to the Indians where there was a conflict with treaty stipulations.

We are not here concerned with the plenary right vested in the state under its police power to enact general laws for regulation and conservation of wildlife, as this right has long been recognized where it does not invade rights protected by the United States constitution or a treaty. *Frach v. Schoettler*, 46 Wn.2d 281, 280 P.2d 1038; *Geer v. Connecticut*, 161 U.S. 519, 40 L.Ed. 793, 16 S.Ct. 600; *Patson v. Pennsylvania*, 232 U.S. 138, 58 L.Ed. 539, 34 S.Ct. 281; *State v. Tice*, 69 Wash. 403, 125 Pac. 168.

The question presented here is whether the rights reserved to the Puyallup Indians by the treaty of Medicine Creek of 1855, and particularly Article III thereof (quoted above), render the Indians immune from the operation of the police power herein sought to be invoked by the state of Washington, when their treaty rights have never been extinguished by the United States. 25 U.S.C.A., Indians, §§ 71, 478(b).

Appellani contends that the state has the power to regulate the time and manner of taking fish, in spite of a valid treaty entered into by the United States and an Indian tribe, so long as the statutory rules and regulations are necessary for the conservation of fish, citing *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 S.Ct. 862 (reversing *State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280), and *Ward v. Race Horse*, 163 U.S. 504, 41 L.Ed. 244, 16 S.Ct. 1076.

The *Tulee* case involved the right of this state to enforce a regulation requiring the Yakima Indians to purchase a fishing license. The Yakima treaty of 1859 (12 Stat. 941) contained a clause similar to the one quoted above, and the state relied upon its broad police powers to uphold the licensing act. We held the act valid (*State v. Tulee*, *supra*), based largely upon the rationale of

Ward v. Race Horse, *supra*; *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L.Ed. 1166, 36 S.Ct. 705, and four of our earlier decisions; *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; *State v. Meninock*, 115 Wash. 528, 197 Pac. 641, and *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94. The supreme court of the United States reversed our decision in the *Tulee* case and held that, although the act was regulatory as well as revenue producing, the exaction of a fee as a prerequisite to fishing at the "usual and accustomed places" could not be reconciled with a fair construction of the Yakima treaty.

In the course of that opinion, the supreme court, speaking through Justice Black, stated

"... that, while the treaty leaves the state with power to impose on Indians, *equally with others*, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,³ it forecloses the state from charging the Indians a fee of the kind in question here." (Italics ours.)

Footnote 3 cites the cases of *New York ex rel. Kennedy v. Becker*, *supra*, and *United States v. Winans*, *supra*.

While we believe that the language quoted is dictum, the inference contained therein, namely, that the state may enact regulations necessary for the conservation of fish and impose them *equally* upon the Indians who fish outside the reservation at their "usual and accustomed places," is not applicable in the case at bar. This rationale originated in the *Race Horse* and *Kennedy* cases, *supra*. The *Race Horse* case denied the Bannock tribe of Wyoming its treaty-hunting right, based upon a repeal by implication. The *Kennedy* case denied the Seneca Indians of New York their "treaty" right to fish and hunt, unimpaired by state regulation, upon land conveyed by them to Robert Morris. The supreme court, in these two cases, held the right was not one existing against the state which it was bound to respect. These two cases are, therefore, distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the

Indians anticipated the future sovereign power to limit them.

In the case at bar, appellant does not contend that the treaty rights of the Puyallup Indians were repealed by implication in our enabling act. 25 Stat. 676. Cf. *Tulee v. Washington*, *supra*; *State v. McClure*, *supra*. Nor is it at all clear that the treaty limits the Indians' reserved rights. We conclude that the *Race Horse* and *Kennedy* cases are not controlling here.

In the *Winans* case, the court was concerned with an easement—not a state regulation. Therefore, the case is not authority for the proposition that the state may impose regulations against the Indians under the police power. However, the rules of construction announced therein are equally applicable in the instant case.

The argument frequently presented by the states (as in the case at bar) to the effect that general regulations may be imposed against the Indians *equally with others*, or *in common with citizens*, has been rejected by the courts. *Tulee v. Washington*, *supra*; *State v. McClure*, *supra*; *State v. Arthur*, *supra*; *Makah v. Schoettler*, *supra*.

We also believe that the language previously quoted from the *Tulee* case was intended to apply only to the factual situations in the cases from which that language was taken. This conclusion is justified because the supreme court, in that case, further stated:

"In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, this court held that, despite the phrase 'in common with citizens of the Territory,' Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co. v. United States*, 249 U.S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to

hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. United States v. Kagama, 118 U.S. 375, 384; Seufert Bros. Co. v. United States, supra, 198-199." (Italics ours.)

The courts have generally recognized that the treaty right of fishing at "usual and accustomed places" was given to the Indians to provide for their subsistence and as a means for them to earn a livelihood. *United States v. Winans, supra; Makah v. Schoettler, supra; State v. McClure, supra*. Applying a liberal—and not a strained—construction to the treaty of Medicine Creek as a whole, it is our opinion that the Puyallup Indians so understood Article III of the treaty, and that neither the Indians nor the United States intended that the states would or could enforce general regulations against the Indians "equally with others" or "in common with all citizens of the Territory" and thereby deprive them of their right to hunt and fish in accordance with the immemorial customs of their tribes. As we interpret the treaty, we believe that the phrase "in common with all citizens of the Territory" merely granted the white settlers and their heirs and/or grantees a right to fish at these places with the Indians, but that the Indians thereby reserved their right to fish at these places irrespective of state regulation, so long as the right shall not have been abrogated by the United States.

No other conclusion would give effect to the treaty, since to hold that their right was *equal* to that of the citizens of the territory would be to say that they were given no right at all, except that which any citizen subject to state statutes and regulations may enjoy to fish at the "usual and accustomed grounds and stations." This interpretation would permit the state to abrogate their treaty rights at will.

We are convinced that, under the applicable decisions

of the supreme court of the United States referred to herein, the statutes and regulations in the case at bar are in conflict with the treaty provisions, constitute an interference with matters that are within the exclusive scope of Federal power and, therefore, cannot be held valid as to the Puyallup Indians, in relation to their right to fish "at all usual and accustomed fishing grounds and stations."

The further contention is made by appellant that, since the Puyallup Indians have alienated certain lands bordering upon the Puyallup river (which were located within the exterior boundaries of the original Puyallup reservation), they have thus lost their treaty right to fish at those locations. There is nothing to indicate that their treaty right to fish in streams flowing through or bordering upon the reservation has been abrogated by the United States. This court, in the case of *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, in so far as their right to fish in streams flowing through or bordering upon the reservation was secured to them by a treaty similar to the one above referred to. We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup river, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the *original Puyallup Indian reservation*, in view of the decision in the *Pioneer Packing Co. case*. Cf. *United States v. Wipans*, *supra*; *State v. McClure*, *supra*:

That the supreme court still adheres to the views expressed by it in the decisions hereinbefore cited, is indicated by its refusal to review the recent decision of the supreme court of Idaho in *State v. Arthur*, 74 Ida. 251, 261 P.2d 135. That decision is directly in point. In that case there was involved a prosecution of a Nez Perce Indian for violation of a state statute forbidding the killing of deer out of season. The killing was alleged to have taken place on land ceded to the Federal government by the Nez Perce tribe. The defendant demurred to the complaint, relying on the provisions of Article III of the Treaty of 1855, which reserved to the Indians the right

to hunt on open and unclaimed land. The demurrer was sustained, and the action dismissed.

The state of Idaho appealed, and its supreme court affirmed the dismissal. In discussing the relative validity of the police power of the state and the treaty-making power of the United States, the court said:

"If the right exists in the State to regulate the killing of game upon open and unclaimed lands ceded by the Nez Perce Indians to the United States, it follows that such right is to be exercised under the police power of this state. Generally stated, the police power under the American constitutional system has been left to the states. It has been considered a power inherent in and always belonging to the states and not a power surrendered by the respective states to the federal government or by the federal government restricted under the United States Constitution. It is under this further general proposition that the State claims its source and scope of power to prohibit killing deer during certain times of the year in the interests of conservation of wild life. That the State has and may exercise such power generally is not the question; this power is limited in the enactment of laws and regulations to the extent that the same are not repugnant to any constitutional provisions of either the State or the Federal Constitution. Is the law and regulation as to a closed season repugnant to rights reserved under the Treaty of 1855?

"The Constitution of the United States does not contain any provisions which expressly limit the police power of any state; however, it does forbid the exercise of certain powers by the state under Art. 1, § 10, of the Federal Constitution, including the inhibition against any state passing any laws impairing the obligation of contracts; moreover, Art. 6, cl. 2 of the Federal Constitution expressly declares that the Federal Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, shall be the supreme law of the land, binding upon the judges in every state notwithstanding anything in the Constitution or laws of any state to the contrary. Hence the federal government is paramount and supreme within the scope of

powers conferred upon it by the Constitution and it follows that a state must exercise its police power subject to constitutional limitations, if any; the statute of any state enacted pursuant to its police power which conflicts with any treaty of the United States constitutes an interference with matters that are within the exclusive scope of federal power and, hence, cannot be permitted to stand. 16 C.J.S., Constitutional Law, § 196, page 565; the treaty being superior to a particular state law and regulation, though the state law and regulation involved is otherwise within the legislative power of the state, the rights created under the treaty cannot thus be destroyed; this in effect holds the application of the statute in abeyance during the existence of the obligation of the treaty. 63 C.J., § 29, pp. 844-45. This recognizes the principle that the provisions of the United States Constitution shall elevate treaties of the federal government over state legislation though the state legislation appertains to the state police power. 11 Am. Jur., § 255, p. 987."

After discussing *Tulee v. Washington*, *supra*, and holding that the *Race Horse* and *Kennedy-Becker* cases had been rejected by the supreme court of the United States in subsequent decisions, the Idaho court continued:

"We are not here concerned with the general right vested in the State under its police power to enact reasonable laws for the conservation of wild life; this right has long been recognized and whenever it can be done without violating any organic act of the land or without invasion of rights protected by constitution or treaty, it is recognized. The question here is whether or not the pre-existing ancient Indian hunting rights which were reserved to them in the Treaty of 1855 may have attached to such rights the exercise of the police power of the State. It is primarily a question of whether or not the police power here sought to be invoked by the State ever has attached to or can apply to such rights without the consent of such Indians or by positive act on the part of the federal government extinguishing the right which was reserved in the Indians and thus far has never passed from them to the people, to the state, or to the nation.

"One of the primary purposes of licensing in reference to fishing and hunting is to conserve wild life; the law is essentially a regulatory act rather than a revenue act. To exact a license under the claimed police power, which the Supreme Court of the United States held could not be done in the case of *Tulee v. Washington*, *supra*, and which the Supreme Court of Idaho held could not be done in the case of *State v. McConville*, [*supra*], certainly would be less onerous upon the affected Indian tribes than the enactment of legislation under the claimed police power limiting the killing of game or prohibiting fishing in certain areas or doing either during certain times of the year. While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence and have been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion; while no doubt this was more so in 1855 than it is now, the fact remains that it is to a lesser extent also true today; be that as it may, their rights reserved in this respect should be determined in the light of conditions existing at the time of the treaty and the manifest intent of all contracting parties at that time. Under the holding of the *Tulee* and *McConville* cases the Supreme Court of the United States in the first case and the Supreme Court of this state in the second case have definitely held that to exact a license fee from the Indians in order to fish, and I assume the same would be true with reference to hunting, could not be reconciled with the rights reserved under the treaty. The decision in each case was not premised on burden but upon principle; surely the exaction of a \$2 fishing license would not unduly burden an Indian who desires to fish nor would it likely cause him to forego this reserved right. His rights of an equal, if not of a superior nature under the treaty to hunt upon open and unclaimed lands, because less restricted by the language of the treaty should upon principle and fair dealing be protected against state laws which limit him to hunt at certain times of the year in common with all other citizens. This would mean that at certain times, of the year his otherwise ancient right recognized by the treaty and never extinguished

would for all practical purposes be extinguished. If the position of the State is sustained the assurance given by Governor Stevens that they could kill game when they pleased and the provision of the treaty reserving to them the right to hunt upon open and unclaimed lands is no right at all. Out of the solemn obligations of the treaty, and the express reserved property right which never passed from the Indians to anyone and which the federal government has never extinguished but has expressly recognized before and after Idaho was admitted to the Union, the Nez Perce would now have no right in any respect different than that enjoyed by all others, except perhaps the freedom from the burden of a license fee. This was never intended under the broad, fair and liberal construction of the treaty. The Supreme Court of the United States has recognized and expressly held that the Indian treaty fishing provisions accorded to them rights which do not exist for other citizens. *Tulee v. Washington*, *supra*; *Seufert Bros. Co. v. United States*, *supra*; *United States v. Winans*, *supra*. What are such rights under the State's theory? Perhaps to hunt without a license. If such rights exist as to fishing most assuredly they exist as to hunting. If the State can regulate the time of year in which they may hunt then they are accorded no greater rights in this respect than exist for other citizens."

The court concluded its opinion by holding that the treaty rights reserved by the Nez Perce Indians still existed unimpaired, and that they could hunt at any time of the year on the lands involved in the case.

The supreme court of the United States in 1954 denied the state of Idaho's petition for certiorari in that case. See 347 U.S. 937, 98 L.Ed. 1087, 74 S.Ct. 627. This action on the part of the supreme court was of unusual significance because the Idaho court was interpreting the supremacy clause of the United States constitution and a treaty made in pursuance thereof, a function which could only be authoritatively performed by the supreme court itself.

Since only the supreme court of the United States has the power to *finally* interpret the meaning of the United

States constitution and treaties made in pursuance thereof, and since it has, from 1832 (*Worcester case, supra*) to 1954 (*Arthur case, supra*), directly and indirectly upheld the supremacy of rights reserved in Indian treaties over state statutes having the effect of impairing or abrogating those rights, this court is bound by its applicable decisions.

In the instant case, the statutes and regulations involved cannot be held to be applicable to the Puyallup Indians. Therefore, the trial court's judgment dismissing the action was correct, even though its reason (to wit, that the state had failed to sustain the burden of showing as to the Puyallup Indians that the statutes and regulations were reasonable and necessary for the conservation of fish) was wrong. Their reasonableness, or unreasonableness, is immaterial.

Where a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition. *Kirkpatrick v. Department of Labor & Industries*, 48 Wn.2d 51, 290 P.2d 979.

One more matter must be noticed. The conclusion we have reached from our interpretation of the applicable decisions of the supreme court makes necessary the overruling of four of our prior cases, namely, *State v. Towns-nute, supra*; *State v. Alexis, supra*; *State v. Meninock, supra*; and *State v. Wallahee, supra*. These cases are wrong in principle, and, to the extent that they are contrary to the views stated herein, they are hereby expressly overruled. See the dissenting opinions in those cases and in *State v. Tulee, supra*.

To summarize, the treaty of Medicine Creek of 1855 is the supreme law of the land and, as such, is binding upon this court, notwithstanding any statute of this state to the contrary, and its provisions will continue to be superior to the exercise of the state's police power respecting the regulating of fishing at the places where the treaty is applicable until:

(1) The treaty is modified or abrogated by act of Congress, or

(2) The treaty is voluntarily abandoned by the Puyallup tribe, or

(3) The supreme court of the United States reverses or modifies our decision in this case.

Judgment affirmed.

SCHWELLENBACH, OTT, and FOSTER, JJ., concur.

ROSELLINI, J. (concurring in the result)—The conservation of the natural resources of this state is a matter of vital importance to all of its inhabitants. The right of the state to enforce its conservation measures is a matter that I do not think should be determined by reference to an opinion of a court of another state when that state chose to ignore language of the United States supreme court that reads:

"The treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 115, 62 S.Ct. 862.

We have used language of similar import to this in every case in which the question of interpretation of Indian treaty rights has been considered. See *State v. Towsnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; *State v. Meninock*, 115 Wash. 528, 197 Pac. 641; *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94; *State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280.

Moreover, I do not think that this court is justified in assuming that, because the supreme court denied certiorari in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135, it approved the holding of that case. That court clearly stated that such an assumption is never warranted. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 75 L. Ed. 1142, 51 S. Ct. 498; *United States v. Carver*, 260 U.S. 482, 67 L.Ed. 361, 43 S.Ct. 181; *House v. Mayo*, 324 U.S. 42, 89 L.Ed. 739, 65 S. Ct. 517; *Sunal v. Large*, 332 U.S. 174, 91 L.Ed. 1982, 67 S.Ct. 1588.

Contrary to the Idaho holding are the cases of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (C.A. 9th) and *McCauley v. Makah Indian Tribe*, 128 F.2d 867 (C.A. 9th), both of which recognize: (a) the power of the state to subject Indians to restrictions for the purpose of conservation; and (b) that their right to fish, granted by the treaty, is not an unlimited right. The majority, however, chose to ignore these decisions rendered by the Federal circuit court in this state, and to adopt an interpretation of the treaty which deprives the state of all right to protect its fish for the benefit of all of its citizens.

The importance of the conservation measures adopted by the state of Washington may be better understood if some of the factors and problems involved are examined. This information, unfortunately, was not presented in evidence in the trial of this cause, but was gleaned from my own research. While these facts cannot control our decision, I do think that they emphasize the importance of the case and, therefore, should be considered before we decide that the state has no right at all to interfere with the fishing practices of Indians.

This case involves the trapping of salmon and steelhead by means of nets in the Puyallup river. There are five or six species of Pacific salmon; and there are two species of steelhead, those that migrate in the winter and those that migrate in the summer. The anadromous fish are hatched in fresh water and descend to salt water where most of their growth is attained. They have a well-developed homing instinct and return to spawn either in the streams of their birth or the streams where they are planted as fingerlings.

The Pacific salmon spawn only once and always die after spawning; the steelhead may spawn more than once. The salmon and steelhead after remaining in the ocean from three to six years, depending upon their species, return as mature fish to the river of their origin to spawn. They spawn in the upper reaches of the rivers and bury their eggs in the gravel beds. The mature fish usually travel close to the river banks during their spawning migration.

The problems of properly managing and preventing the

extinction of this vast fishery resource are of real concern to the state. The Washington department of fisheries, in its 1953 report, placed the capitalized value of fish and shell fish resources in this state at \$679,150,000. To this value must be added the contribution of salmon as a recreational asset. In recent years, from 150,000 to 200,000 fishermen have participated in saltwater sport angling on Puget Sound, in waters along the coast of Washington, in the Columbia river as far upstream as Wenatchee, and in other salmon-producing rivers. They spend \$8,500,000 annually on fishing trips. There are 160 boathouses and resorts with an investment value of \$12,000,000.

The state regulations to conserve and preserve fishery are vital activities in the over-all scheme of administering this resource in such a way that it can provide a constant source of food, wealth, and recreation.

The International Halibut Commission and the International Sockeye Salmon Commission have effectively demonstrated how two nearly extinct species (halibut and sockeye) have been restored by the promulgation and enforcement of conservation laws and regulations.

The methods commonly used to conserve the fish have been to regulate the season's catch and the gear used, to the end that sufficient fish escape to propagate and reproduce themselves. The fish hatchery is essential in combating the depletion of fish runs. Without artificial propagation, the maintenance and rehabilitation of this resource would be impossible. The Washington game department's record of planting and catching steelhead in the Puyallup river is persuasive of the need for this artificial propagation.

PUYALLUP RIVER

<i>Year</i>	<i>Steelhead Plants</i>	<i>Year</i>	<i>Steelhead Returns</i>
1945	37,694		
1946	65,877		
1947	177,596	1947-48	1,771
1948	53,467	1948-49	3,291
1949	298,300	1949-50	* 4,821
1950	283,914	1950-51	4,808
1951	66,462	1951-52	** 14,592
1952	174,682	1952-53	14,190
1953	81,124	1953-54	16,886
1954	53,935	1954-55	13,351
1955	70,270	1955-56	18,496
1956	56,876	1956-57	(Data not yet available)

* (1950 first true downstream migrants planted)

** (First return of hatchery fish)

The defendants herein had two set nylon nets in the Puyallup river. The shorter one was 80 feet in length and 20 feet in width or depth, with 6½-inch diamond-shaped webbing. The longer net was the same, except that it was 140 feet in length. The shorter net was anchored at one end to the bank by means of a rock; and the longer net was upstream from the shorter one and anchored to the bank by means of piling. The opposite ends of each net were anchored with pilings in the stream, each net running at right angles to the bank of the river.

When fish attempt to migrate upstream, they are caught and become enmeshed by their gills in the webbing of set nets. Nylon nets are a new device; they are practically invisible in the water. Such nets are so constructed that they take practically every fish that attempts to go upstream.

* Any obstruction that prevents the anadromous fish from escaping to its spawning ground will destroy that particular fish run. The regulations in question were enacted to prevent such obstructions and other interference with the fish during the spawning season. I do not think it can be seriously questioned that such laws and regulations for conservation, as generally applied, are reasonable.

The majority chose to enlarge the ruling of *Tulee v. State, supra*, that the state has no right to exact a license fee from the Indians for a privilege guaranteed to them by the treaty with the United States. It enlarged this ruling to a holding that state regulations designed to conserve the fish may not be enforced against the Indians. The majority opinion does this in spite of the fact that it recognizes the right of the state to impose such restrictions outside the reservation, and in spite of the fact that the treaty provides that the right is to be "enjoyed in common with all the citizens of the Territory."

The treaty with the Indians "should be construed in the light of the conditions and circumstances existing at the time it was executed. It was never anticipated nor imagined at that time that the present technological advances in the method of taking fish would be developed. Nylon net was unknown. The Indians did not possess the technical knowledge nor materials to manufacture nets in lengths sufficient to span an entire stream. The outboard motor was nonexistent.

To interpret the treaty in a manner that would permit the Indians to use the best and most advanced techniques and equipment to the extent that the fish are destroyed would, in my opinion, go far beyond what was intended either by the citizens of the Territory or the Indians. *Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share.*

The argument is made that if the state may forbid fishing during certain seasons, it may forbid it altogether, but the unreasonableness of such a law should be manifest.

As a practical matter, it has been determined that unless these conservation measures are enforced, the fish will become extinct and the Indians' rights will become worthless. If the Indians will accept the benefit of the state's activities directed to the preservation and replenishing of the supply of fish, they should accept also the burden incident to these measures. Surely it was never contemplated that the right given to the Indian should

be used to destroy the means of his enjoying that right—a destruction that would affect not only the Indians but also the other citizens entitled to fish the waters of the state.

The trial court decided this case against the state on the ground that the state had failed to sustain the burden of proving that the regulation was reasonable and necessary or rather, that the enforcement of the regulation against the defendants was reasonable and necessary for the preservation of fish. In doing so, the court adopted the holding of *Makah v. Schoettler, supra*. It is the general rule that such a regulation is presumed to be valid and the burden of proving its invalidity is upon the party challenging the regulation. The court, however, felt that in such a case as this—where the enforcement of the regulation, if not reasonable and necessary, would infringe a treaty right of the Indian—the burden should be upon the state to show that the violation of the regulation by the Indian threatens the conservation program. I would uphold the trial court in its disposition of the cause, for it is true that the state made no attempt to show that the conservation program was seriously affected by the fishing activities of the defendants or of the Indians generally. But I would not go further, as the majority has, to say that the treaty intended that the state may never interfere with fishing by Indians in their usual and accustomed places, no matter how wasteful and destructive their fishing may be. Such a holding is unnecessary to a decision of the case. Furthermore, I think it is unwarranted under the facts and the law.

For these reasons, I would affirm the trial court's judgment.

HILL, C. J. FINLEY, and MALLERY, JJ., concur with ROSELLINI, J.

FINLEY, J. (concurring in the result)—I have signed the concurring opinion written by Judge Rosellini and join in the views expressed therein, but wish to add the following brief comments:

Considering their length and depth, the modern nylon

nets used by defendants if placed in the river and left there, as in the instant case, unquestionably would constitute a hazard to the escapement upriver of spawning salmon and steelhead during certain periods of the year. The extent or the degree of the seriousness of the hazard in terms of conservation and rehabilitation of fish life is a matter that would be subject to proof, as in any other case.

In this connection, it should be noted that the instant case focuses attention only upon defendants and their nets. Considering the matter of conservation and the equally, if not more, important matter of rehabilitation of the fish runs in the rivers and streams of this state in relation to reasonable police power regulations, the problem posed would seem to involve not only the question of the use and effect of the modern nylon nets of defendants, but the use and effect of such nets by numbers of other individuals, including other Puyallup Indians.

The majority opinion states that the constitution of the United States and the treaties enacted or promulgated pursuant thereto unquestionably have been held to constitute the supreme or controlling law of the land. With this I agree without any reservation whatsoever. But the constitution and the treaties enacted pursuant thereto are basic documents of government. They do not in and of themselves spell out and govern specifically the myriad details and day-to-day implications which may and do arise in relation to such documents of government. Such definition enunciation normally falls within other areas of social control; *i.e.*, within the proper ambit of the legislature or the judiciary. Under our system of government, there should no longer be any doubt as to (1) the validity of the doctrine of judicial review, (2) the supremacy of the judiciary in this respect, and (3) that interpretation and clarification of constitutional, statutory, or treaty provisions by the judiciary are acceptable and established principles. The problem in the instant case must be viewed in this light, and I think the fundamental question is the reasonableness of the police power regulation attempted by the state of Washington.

Setting aside, merely for the moment, any discussion or

consideration of constitutional and treaty provisions, there should be little doubt that reasonable police power regulation as an abstract matter would be desirable when, as, and if, necessary to prevent the depletion or absolute destruction of fish life in the rivers and streams of this state. This should be true from the standpoint of the Indians, as well as of other residents of the state. Now, if we turn back several decades, in view of the then overabundant quantities of fish in the rivers, streams, lakes, and other waters of the Pacific Northwest, it is unlikely that the parties to the Indian treaty contemplated any necessity for scientific conservation and rehabilitation; but what would the attitude of the makers of the Indian treaty have been, if they had considered or had been confronted with the problem of conservation and rehabilitation? As to this question, the majority opinion would attribute an abysmal ignorance and lack of intelligence both to our constitution makers and to the signatories of the Indian treaties. The assumption inherent in this, I think, is unwarranted.

As to the validity of the state regulation here involved, I think the inquiry of the court should be directed to the intent and purpose of the treaty makers in the same manner that judicial inquiry is made respecting intent and purpose in the process of interpretation and application of any provisions of our state or Federal constitutions.

The basic purpose of the treaty was to preserve, not to destroy, the fishing rights of the Indians. As I see the problem in the case at bar, it is simply one of approach or orientation regarding (a) the interpretation and application of constitutional and treaty provisions and (b) the nature of the judicial function in relation thereto. If even one judicial eye is kept open respecting the fundamental purpose of the treaty to protect Indian fishing rights, and if this purpose is evaluated intelligently in terms of the settlement and the development of our state which has taken place most significantly in the last fifty years, then it seems to me that the state of Washington, as a matter of constitutional right, should have at least an opportunity to prove by competent factual data that the police power regulation here involved is a reasonable one, not incon-

sistent with the purpose of the Indian treaty but in furtherance thereof, from which the courts might or might not conclude that the regulation would be valid. In other words, as Judge Rosellini suggests, the problem is one of proof.

It may be suggested, and if so it is certainly true, that the Puyallup Indians did not encourage or sponsor, and are not to be held morally or legally responsible for, the increase in population and the development of the state of Washington. However, this significant increase in population and the development of the state were not prohibited by the terms of the Indian treaty. Even if not contemplated, the changes that have taken place were perhaps inevitable. In any event, the changes have taken place and are now with us and the Indians as well.

Judicial recognition of the fundamental purpose of the treaty (*i.e.*, the preservation of Indian fishing rights) and judicial recognition of the facts of life relative to conservation and rehabilitation of fish are not inconsistent. Such judicial action is not in derogation and in violation of the Indian treaty, but is in furtherance thereof. In his concurring opinion, Judge Rosellini states that the only question in this case is whether the state has proved by competent evidence that regulation of fishing nets in the river is reasonably designed and necessary for the preservation of fish life for the benefit of the Indians, as well as for other residents of this state. I agree. For the above reasons and those stated by Judge Rosellini, I concur in the end result reached by the majority opinion—namely, that the decision of the trial court should be affirmed.

ADDENDUM BY HILL, C.J. The eight judges who heard the *En Banc* argument on this case on February 13, 1957 (Judge Weaver being incapacitated at that time), are agreed that the order of the trial court dismissing the charges against the two defendants should be affirmed, but they are in disagreement as to the reason for the affirmation.

Three judges have signed Judge Donworth's opinion, and three judges have signed Judge Rosellini's opinion and there is no majority opinion. It therefore follows that

the cases which Judge Donworth's opinion states are overruled, are not in fact overruled, and nothing is decided except that the order dismissing the charges against the defendants is affirmed.

OCTOBER TERM, 1939

Syllabus.

UNITED STATES v. UNITED STATES FIDELITY & GUARANTY CO. ET AL.

Certiorari to the Circuit Court of Appeals for the Tenth Circuit

CERTIORARI, 308 U.S. 548, to review the affirmance of a judgment of the District Court for the Eastern District of Oklahoma, 24 F. Supp. 961, which, in reliance upon a judgment of the District Court for the Western District of Missouri, rejected a claim made by the United States on behalf of the Choctaw and Chickasaw Nations and allowed against them a counter-claim of interveners.

Solicitor General Biddle, with whom *Assistant Attorney General Littell* and *Mr. Thomas E. Harris* were on the brief, for the United States.

Messrs. Bower Broadbuss and *Julian B. Fite* for respondents.

The counterclaim is not against the United States but the Tribes. *United States v. Algoma Lumber Co.*, 305 U.S. 415; *Folk v. United States*, 233 F. 177; *United States v. Ft. Smith & Western Ry. Co.*, 195 F. 211.

The federal court in Missouri had jurisdiction to render an affirmative judgment against the Tribes. Act of April 26, 1906, § 18; c. 1876, 34 Stat. 137, 144, considered with statutes conferring jurisdiction on the District Courts.

A transitory action in the name of the United States must be brought in the district in which the defendant resides.

Congress has consented to an affirmative judgment

against the Tribes, and any right to have the claim confined in the federal courts of Oklahoma was waived by contesting the claim in Missouri. Dist'g *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U.S. 493. See, *Peoria & Pekin Union R. Co. v. United States*, 263 U.S. 528, 535; *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47.

The determination of the question of jurisdiction by the court in Missouri may not be assailed collaterally. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371; *Stoll v. Gottlieb*, 305 U.S. 165.

When the claim of the Tribes was submitted to the Missouri court the United States and the Tribes were litigants like any other suitor. *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44; *Porto Rico v. Ramos*, 232 U.S. 627; *Folk v. United States*, 233 F. 177. The Tribes as now constituted are not sovereigns immune from suit. The defense of sovereign immunity was waived.

As the court in Missouri had jurisdiction, its judgment was binding in the Oklahoma suit. Dist'g *United States v. Eckford*, 6 Wall. 484. When suing on behalf of the Tribes, the United States has no greater right than they. *Folk v. United States*, 233 F. 177; *United States v. Ft. Smith & Western Ry. Co.*, 195 F. 211.

The matter before the court in Missouri was one to which its jurisdiction would extend between ordinary litigants, as the suit arose under the laws and treaties of the United States, Jud. Code 24(1), 28 U.S.C. § 41(1).

The case was in equity, so whether the right to counterclaim be procedural or substantive (see *The Gloria*, 286 F. 188), the defendant could interpose it and obtain an affirmative judgment. Equity Rule 30.

The trend of modern authorities is to differentiate between the authority to render a judgment and the authority to order its enforcement. *The Gloria*, 286 F. 188; *The Newbattle*, 10 Prob. Div. 33; *United States v. Nuestra Senora De Regla*, 108 U.S. 92; *The Paquete Habana*, 189 U.S. 453; *United States v. The Thekla*, 266 U.S. 328; *Guaranty Trust Co. v. United States*, 304 U.S. 126;

Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705; *Russia v. Bankers' Trust Co.*, 4 F. Supp. 417, affirmed *United States v. National City Bank of New York*, 83 F.2d 236, cert. den. 299 U.S. 563.

When the judgment was rendered in Missouri the claim theretofore existing was merged in it. *Wycoff v. Epworth Hotel Co.*, 146 Mo. App. 554.

The interveners came in as party defendants, without objection, and their claim was properly allowed under the Act of 1906.

MR. JUSTICE REED delivered the opinion of the court.

This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, *res judicata* in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States; does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit.

Certiorari was granted¹ because of probable conflict, on the first question, between the judgment below and *Adams v. United States*² and because of the importance of clarifying the meaning of the language in *United States v. Eckford*³ relating to the judicial ascertainment of the indebtedness of the Government on striking a balance against the United States where cross-claims are involved. A somewhat similar question arises in *United States v. Shaw*.⁴ The second question was taken because its solution is involved in certain phases of this litigation.

The United States, acting for the Choctaw and Chick-

1. 308 U.S. 548.

2. 3 Ct. Cls. 312.

3. 6 Wall. 484.

4. *Ante*, p. 495.

asaw Nations, leased some coal lands to the Kansas and Texas Coal Company, with the respondent United States Fidelity and Guaranty Company acting as surety on a bond guaranteeing payment of the lease royalties. By various assignments the leases became the property of the Central Coal and Coke Company, as substituted lessee, the Guaranty Company remaining as surety. The Central Coal & Coke Company went into receivership in the Western District of Missouri, and the United States filed a claim for the Indian Nations for royalties due under the leases. Answering this claim, the Central Coal and Coke Company denied that any royalties were owing and claimed credits against the Nations for \$11,060.90. By order of the court, reorganization of the Coal Company under § 77B of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the Nations was allowed for \$2,000, the debtor's cross-claim was allowed for \$11,060.90, and the court on February 19, 1936, decreed a balance of \$9,060.90 in favor of the debtor, to be "collected in the manner provided by law." No review of this judgment of the Missouri district court was ever sought.

On December 24, 1935, the United States, on its own behalf and on behalf of the Indian Nations, filed the present suit in the Eastern District of Oklahoma against the Guaranty Company, as surety on the royalty bond, for the same royalties involved in the Missouri proceedings. After the judgment of the Missouri district court, the Guaranty Company pleaded that judgment as a bar to recovery by the United States. The trustee of Central Coal and Coke Company, and the Central Coal and Coke Corporation, which had taken over certain interest in the assets of the Coal Company, alleged by a petition for leave to intervene, and, upon its allowance without objection, by an intervening petition, that they were necessary and proper parties because each had an interest in the judgment of the Missouri court; they pleaded the Missouri judgment as determinative and pleaded the merits of the counterclaims by setting up the facts which supported the judgment; they asked for a decree that the

Missouri judgment was valid, for a determination of accounts between themselves and the Indian Nations, and for all other proper relief. Replying to the answer of the surety and the petition of the interveners, the United States pleaded that the Missouri judgment was void as to the interveners' cross-claims because the court was "without jurisdiction to render the judgment" against the United States and denied the cross-claims on the merits. The district court concluded that the Missouri judgment barred the claim against the surety and entitled the interveners to a judgment against the Indian Nations in the amount of the balance found by the Missouri court. This judgment the Circuit Court of Appeals affirmed.⁵

A.—By concession of the Government the validity of so much of the Missouri judgment as satisfies the Indian Nations' claim against the lessee is accepted. This concession is upon the theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.⁶

B.—We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. In *United States v. Shaw*⁷ we hold that cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration. Proceedings upon them are governed by the same rules as direct suits. In the Missouri proceedings, in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do.⁸ No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the

5. 106 F.2d 804.

6. *Bull v. United States*, 295 U.S. 247, 261.

7. *Ante*, p. 495.

8. *Heckman v. United States*, 224 U.S. 413, 442; *Mullen v. United States*, 224 U.S. 448, 451; *United States v. Rickert*, 188 U.S. 432. These cases discuss, also, the relationship between the United States and the Choctaw and Chickasaw Nations. See also *United States v. Choctaw etc. Nations*, 179 U.S. 494, 532; *Choctaw Nation v. United States*, 119 U.S. 1, 28.

Act of June 7, 1897, 30 Stat. 62, 83; Atoka Agreement, 30 Stat. 495,

United States.⁹ The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent¹⁰ continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization.¹¹ It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. The Congress has made provision for cross-suits against the Indian Nations by defendants.¹² This provision, however, is applicable only to "any United States court in the Indian Territory." Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding.¹³ The desirability for complete settlement of all issues between parties, must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.

But, it is said that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immu-

505; Act of March 3, 1901, 31 Stat. 1447; Act of April 26, 1906, 34 Stat. 137, 144. Under § 28 of the Act of April 26, 1906, the tribal existence of the Chickasaw and Choctaw Nations is continued as modified by that and other acts.

9. Cf. *United States v. Algoma Lumber Co.*, 305 U.S. 415.

10. Cf. *Cherokee Nation v. Georgia*, 5 Pet. 1.

11. *Turner v. United States*, 248 U.S. 354, 358; *Adams v. Murphy*, 165 F. 304, 308; *Thebo v. Choctaw Tribe of Indians*, 66 F. 372.

12. Act of April 26, 1906, § 18, 34 Stat. 137, 144, 148.

13. Cf. *Fidelity Ins., Trust and S. D. Co. v. Mechanics' Sav. Bank*, 97 F. 297, 303.

nity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.¹⁴

The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.¹⁵ *Chicot County Drainage District v. Baxter State Bank*¹⁶ is inapplicable where the issue is the waiver of immunity.

In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy.¹⁷ To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status,¹⁸ extra-territorial action of courts,¹⁹ or

14. *Minnesota v. United States*, 305 U.S. 382, 388 and cases cited; *Munro v. United States*, 303 U.S. 36, 41; *Finn v. United States*, 123 U.S. 227, 232.

15. *Kalb v. Feuerstein*, 308 U.S. 433.

16. 308 U.S. 371.

17. See the last paragraph of the opening statement and the first paragraph of division *Second*. 308 U.S. 374, 376.

18. *Andrews v. Andrews*, 188 U.S. 14.

19. *Fall v. Eastin*, 215 U.S. 1.

strictly jurisdictional and quasi-jurisdictional facts.²⁰ No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity shall prevail.

C.—The conclusion that the Missouri judgment is void determines this review. There is left in the case, however, an issue which requires brief reference to the second question upon which certiorari was granted. The intervening petition set up the facts supporting the claim of the interveners against the Indian Nations. An issue was made and the evidence of the Missouri controversy stipulated for consideration in the present case. As the district court determined that the Missouri judgment was valid, no finding or conclusion appeared in the judgment of the district court upon the merits. Respondents made no objection to this omission but call attention to it in their brief. On a new trial this issue obviously will be important.

It is the contention of the Government that the cross-claim cannot be liquidated in this proceeding for the reason that by the statute under which this suit is brought, the right to set up a cross-claim is limited to "party defendants."²¹ Respondents' reply that as they were admitted as interveners without objection, as they have an interest in cross-claims arising from the same transactions which form the basis of the principal suit, and as one of them is a principal liable for any judgment against the defendant surety, they are to all intents and purposes defendants under § 18 of the Act of April 26, 1906.

As this judgment was entered before the effective date of the Civil Rules, procedure as to parties was governed by the Conformity Act.²² Apparently under Oklahoma

20. *Noble v. Union River Logging R. Co.*, 147 U.S. 165; cf. *Johnson v. Zerbst*, 304 U.S. 458.

21. 34 Stat. 137, § 18:

22. R. S. 914; *Sawin v. Kenny*, 93 U.S. 289; *United Mine Workers v. Coronado Co.*, 259 U.S. 344, 382.

law the principal in the bond could not compel its admission as a party defendant.²³ As the Government did not object to the order filing the intervening petition, we assume it properly filed and that the trustee for the Coal Company was actually a defendant. The name used is immaterial.

Whether the Coal Company was such a defendant as was meant by § 18 raises other questions. Since they depend upon an interpretation of the federal statute they are to be determined by federal, not Oklahoma, law.²⁴ As the extent and character of the interest of the assignee Coal Corporation in the unliquidated claims of the Company do not appear from the record, we do not pass upon the question of whether the Company defendant has any cross-claim against the Indian Nations, after satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned jointly with the Corporation, it is a claim the Company may enforce as defendant under § 18.

The cause is reversed and remanded to the district court for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE McREYNOLDS took no part in the decision of this case.

23. *Fidelity & Deposit Co. v. Sherman Machine & Iron Works*, 62 Okla. 29.

24. *Board of County Commissioners v. United States*, 308 U.S. 343, and *Deitrick v. Greaney*, ante, p. 190.



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IN THE
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OCTOBER TERM, 1967

NO. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON AND THE
DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,
Respondents.

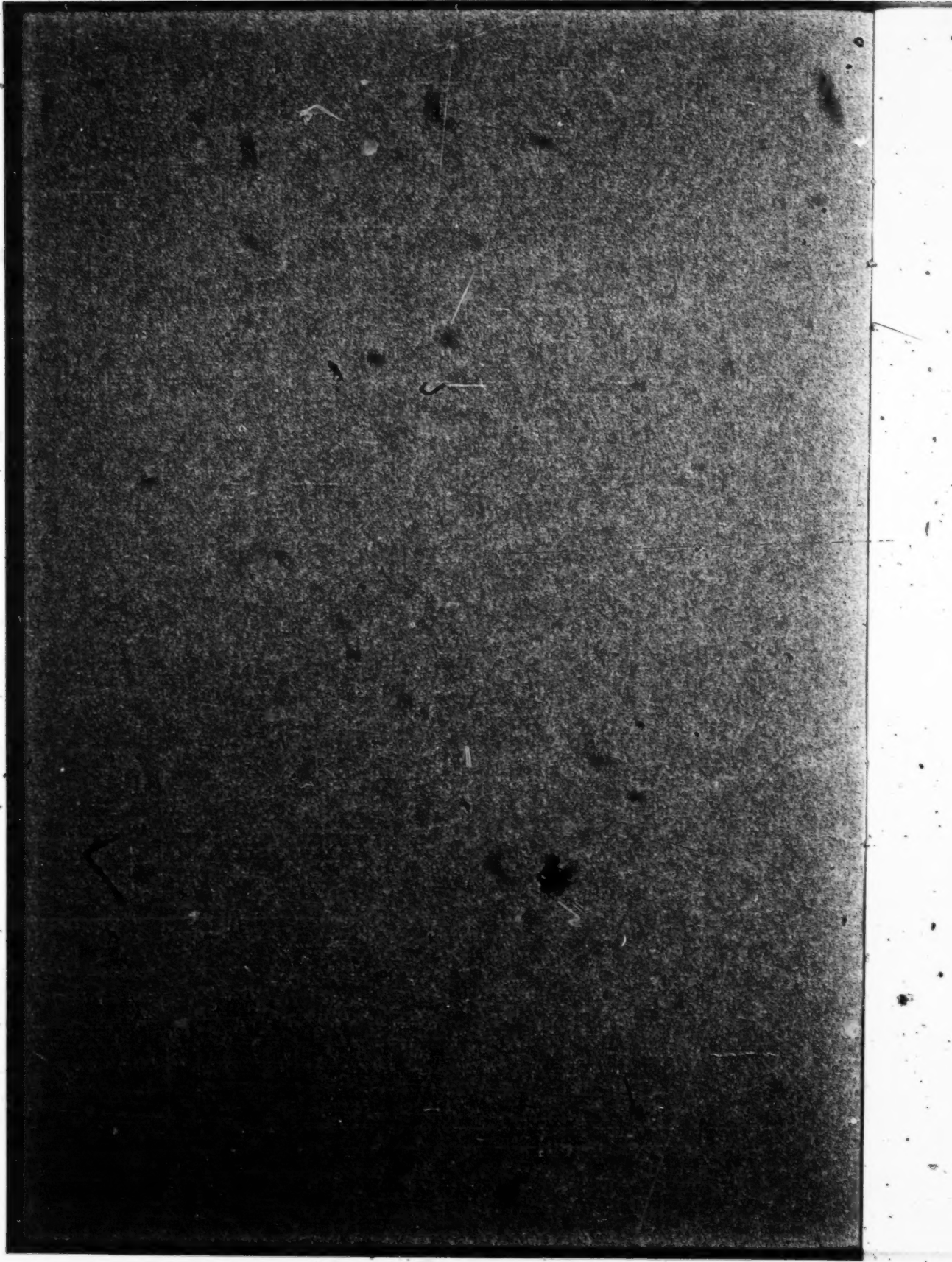
PETITION FOR WRIT OF CERTIORARI
the Supreme Court of the State of Washington

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE
OF IDAHO FISH AND GAME DEPARTMENT URGING
GRANTING OF PETITIONER'S APPLICATION FOR
A WRIT OF CERTIORARI

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Counsel for State of Idaho Fish and Game Department.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO. 247

THE PUYALLUP TRIBE, a Federal Organization,
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DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON AND THE
DEPARTMENT OF FISHERIES OF THE
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Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR AMICUS CURIAE STATE OF IDAHO FISH
AND GAME DEPARTMENT IN SUPPORT

STATEMENT OF INTEREST

The State of Idaho through its Fish and Game Department, being represented by its Attorney General, pursuant to Rule 27, par. 9. (d), Revised Rules of the Supreme Court of the United States, urges the granting of petitioner's Application for a writ of certiorari to review the decree of the Supreme Court of the State of Washington in its opinion for the above-entitled case reported at 70 Wn. Decisions (2d) 241 (1967).

The Idaho Fish and Game Department is organized under Title 36 of the Idaho Code and has the

duty to preserve, protect, propagate and manage the fish and wildlife resources within the State of Idaho and in waters boundary thereto.

The State of Idaho supports a large anadromous fishery resource and a sizable portion of the State's economic structure is built around sport fishing by residents and non-residents for anadromous fish.

All anadromous fish migrating from the Pacific Ocean to their natal streams in Idaho must first ascend the Columbia River and then the Snake River where the same are subject to off-reservation fishing by Indians who are members of tribes located in Washington, Oregon and Idaho.

For the above and foregoing reasons the State of Idaho has long been concerned with the impact of the off-reservation Indian fishing, both commercial and non-commercial on the anadromous fishery resources of the States of Washington, Oregon and Idaho.

ARGUMENT

The State of Idaho submits that there is a present need for a review by the United States Supreme Court of the right of the State of Washington to impose reasonable and necessary regulations upon off-reservation Indian fishing, inasmuch as such a determination by this Court will also be determinative of the right of the State of Idaho to impose regulatory restrictions as are reasonable and necessary for the conservation of the fishery resource upon Indians in Idaho who claim treaty off-reservation fishing rights under treaty provisions iden-

tical to or very similar to the provisions of the Treaty of Medicine Creek, 10 Stat. 1132.

CONCLUSION

For the foregoing reasons, the State of Idaho Fish and Game Department respectfully urges the court to grant petitioner's application for a writ of certiorari.

Respectfully submitted,

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AUG 8 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, A Federal Organization,
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**DEPARTMENT OF GAME OF THE STATE OF WASHING-
TON, and the DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,**
Respondents.

BRIEF OF AMICUS CURIAE,

**State of Oregon,
in Support of**

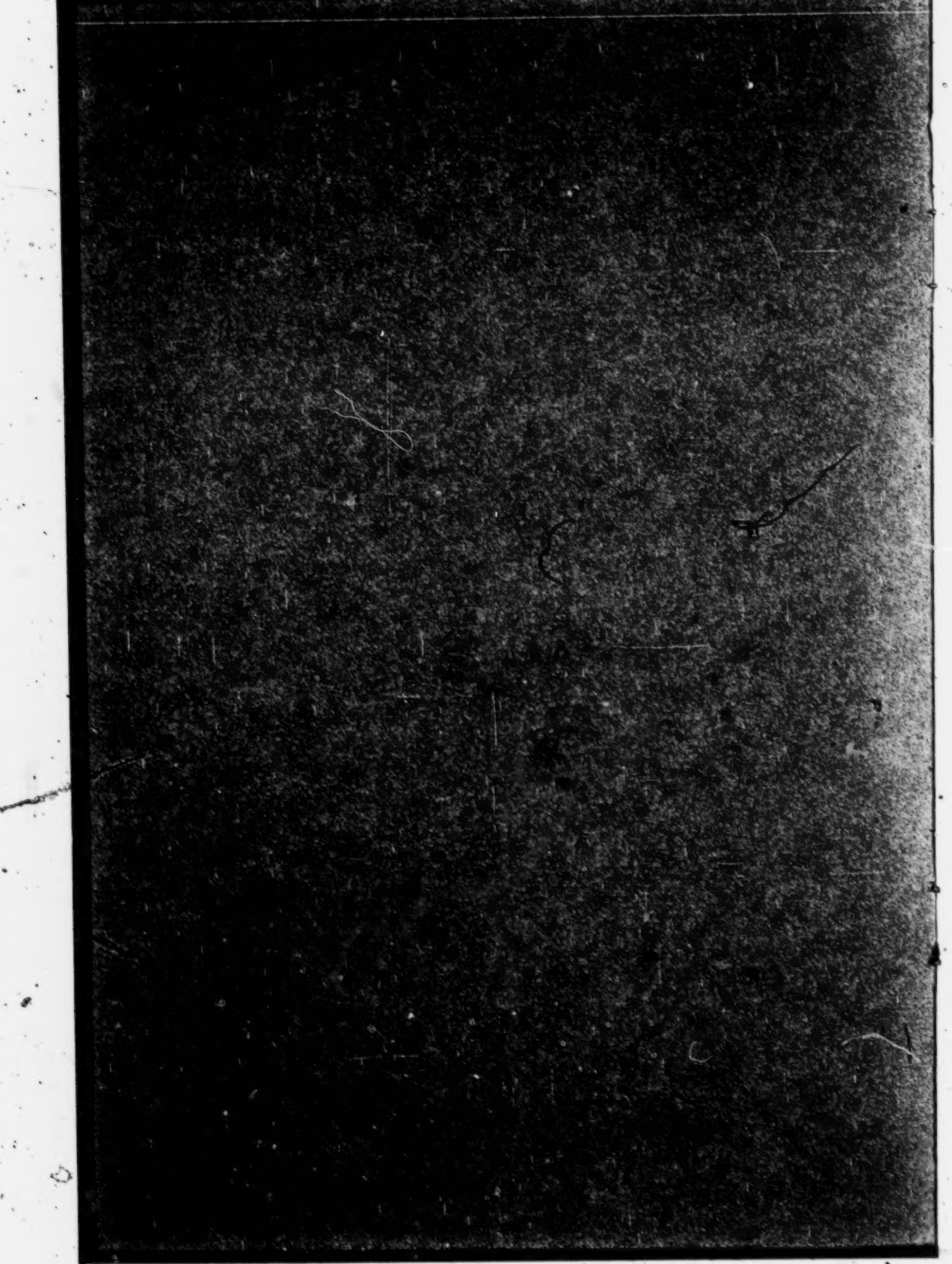
PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

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In the Supreme Court of the United States

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No. _____

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DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
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BRIEF OF AMICUS CURIAE

State of Oregon,

in Support of

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United States:

The Sovereign State of Oregon, through ROBERT Y.
THORNTON, its Attorney General, as amicus curiae,
prays that a Writ of Certiorari issue to review the judgment of the Washington State Supreme Court in the above entitled case, the opinion of which was filed on the 12th day of January, 1967, and which became a final judgment on March 13, 1967, according to remittitur of Supreme Court dated March 15, 1967.

STATEMENT OF INTEREST OF AMICUS

The State of Oregon adjoins the State of Washington on the South, and the Columbia River forms the major part of the boundary between the states. The Columbia River and tributaries are inhabited by the same species of migratory fish as are involved in this appeal. At present, there are several tribes and bands of Indians in the State of Oregon, Washington, and Idaho who assert the right under color of treaties negotiated with the United States in 1855 to conduct an unregulated fishery upon the stocks of migratory fish which inhabit the Columbia River system. The treaties which they claim grant them an immunity to the operation of State laws are:

Treaty with the Yakimas, June 9, 1855, (12 Stat. 951); Treaty with the Nez Perce, June 11, 1855, (12 Stat. 957); Treaty with the Tribes of Middle Oregon, June 25, 1855, (12 Stat. 963); and Treaty with the Walla Walla, Cayuse, etc., June 9, 1855, (12 Stat. 945).

The language in Article 1. upon which the Treaty Indians in the Columbia River area rely to support their position that they are exempt from State conservation laws, is identical with the language relied upon by the Puyallup Indians in this case. This language was interpreted by the Supreme Court of the State of Washington in the decision which is the subject of this appeal.

Any decision rendered by this court or other courts of competent jurisdiction, has an immediate and controlling effect upon the State of Oregon in its conduct *vis a vis* the Indian tribes inhabiting the Columbia River

system in managing and conserving the wildlife resources of the State which belong to the people of the state.

REASON FOR GRANTING THE WRIT

The construction of the treaty fishing rights by the lower courts is not in accord with applicable decisions of this court.

The State of Oregon is in substantial agreement with recent decisions of the Supreme Court of the State of Washington, *State v. McCoy* (63 Wash. 2d 42), (387 Pac. 2d 942); *State v. Herman Moses* (70 W.D. 2d 276); *Department of Game v. The Puyallup Tribe, Inc.* (70 W.D. 2d 241); *Department of Game v. Nugent Kautz* (70 W.D. 2d 270), the latter three of which are on appeal to this court. However, these decisions are not binding in this State, especially in the Federal Courts.

The rule, as enunciated by this court, is expressed in *Organized Village of Kake v. Egan* (1962) (82 S. Ct. 562) (369 US 60), where Justice Frankfurter said: "Even where reserved by federal treaties, off-reservation hunt- and fishing rights have been held subject to state regulation." The cases cited in support of this statement are: *Ward v. Race Horse* (163 US 504), (16 S. Ct. 1076), (41 L. Ed. 244); *Tulee v. Washington* (315 US 681), (62 US S. Ct. 862), (86 L. Ed. 1115).

This court has never held that the states lack the power to regulate off-reservation treaty Indian fishing. See in addition: *U.S. v. Winans* (198 US 371); *State of New York, ex rel Kennedy v. Becker* (241 US 556).

However, as a result of two cases, *Confederated Tribes of the Umatilla Indian Reservation, et al v. Maison et al*, (186 Fed. Supp. 519), and *Maison v. Confederated Tribes, et al* (314 Fed. 2d 169, Cert. Den. 375 US 829, 11 L. Ed. 2d 60), Oregon State officials are enjoined from enforcing state conservation laws on off-reservation areas against members of the Confederated Tribes of the Umatilla Indian Reservation.

CONCLUSION

Therefore, the Sovereign State of Oregon, through ROBERT Y. THORNTON, its Attorney General, as amicus curiae, respectfully prays that the Supreme Court of the United States grant the writ of certiorari as petitioned for in this case in order that the question as to the power of the several states to regulate the off-reservation hunting and fishing rights by its treaty Indian citizens be again resolved.

Respectfully Submitted:

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AUG 10 1967

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT
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UNITED STATES

OCTOBER TERM, 1967

No. 319

NUGENT KAUTZ, et al.,

Petitioners,

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DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF WASHINGTON

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Special Assistant Attorney General,

MIKE JOHNSON,
Assistant Attorney General,

ED MACKIE,
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MEMORANDUM FOR RESPONDENTS

STATEMENT

The Department of Game and the Department of Fisheries of the State of Washington (respondents herein) are duly constituted agencies of state government charged with the duty of conserving, preserving, propogating and maintaining food fish and

game fish for the benefit of the public. (Revised Code of Washington, Title 75 and Title 77). The food fish and game fish resources of the state are of great importance in terms of economic and recreational benefits to the public.

In recent years, various of the thirty-nine tribes and bands of Indians in the 'State of Washington who are signatories to and beneficiaries of treaties with the United States' have asserted privileges and immunities from the application of state fishery conservation laws and regulations. Petitioners herein are one such group of Indians who claim privileges and immunities under the Treaty of Medicine Creek, 10 Stat. 1132. Under such claimed treaty-secured privileges and immunities, petitioners and large numbers of other Indians have begun to engage in large scale net fisheries outside reservation boundaries on rivers and streams throughout the State of Washington for commercial purposes. The effect of such unregulated off-reservation Indian fisheries has been to seriously deplete salmon and steelhead runs in some of our watersheds. If permitted to continue, irreparable damage will be done to the salmon and steelhead resources of the State of Washington.

¹Treaty of Medicine Creek, 10 Stat. 1132; Treaty With The Yakima, 12 Stat. 951; Treaty of Point Elliot, 12 Stat. 927; Treaty With The Quinault, 12 Stat. 971; Treaty With The Walla Walla, 12 Stat. 945; Treaty With The Makah, 12 Stat. 939; Treaty With The Nez Perce, 12 Stat. 957.

ARGUMENT

Serious confusion has arisen between the state agencies charged with the duty of conserving salmon and steelhead and large numbers of treaty Indians who claim immunity from the application of state fishery conservation laws. Courts of various jurisdictions have construed the treaty language, as it pertains to off-reservation fishing and hunting activities by Indians, in a contradictory manner. The treaty language in question is "* * * the right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory * * *" (10 Stat. 1132).

The Supreme Court of Idaho has ruled the State of Idaho has no jurisdiction to enforce its hunting laws and regulations to treaty Indians outside reservation boundaries, *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1954).

The Ninth Circuit Court of Appeals has ruled that the State of Oregon may only apply its conservation laws and regulations to Indians outside reservation boundaries where it is "indispensible" to the preservation of the resource itself. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

In the opinion below, the Supreme Court of the State of Washington interpreted the same treaty language in such a manner as to permit the state agencies to enforce state conservation laws and reg-

ulations to treaty Indians outside reservation boundaries whenever it is "reasonable and necessary" to do so. *Department of Game v. Nugent Kautz*, 70 W.D. 2d 270, 422 P.2d 771 (1967) and *Department of Game v. The Puyallup Tribe, Inc.*, 70 W.D. 2d 241, 422 P.2d 754 (1967).²

In light of the varying interpretations placed upon the language which is found in all Indian treaties executed in the Pacific Northwest, respondents recommend that this Court grant the Petition for a Writ of Certiorari.

Respondents would also point out that the differing interpretations of the treaty language by the lower courts, discussed above, are directly inconsistent with prior decisions of this Court. See: *Ward v. Race Horse*, 163 U.S. 504 (1896); *United States v. Winans*, 198 U.S. 371 (1905); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942) and *Village of Kake v. Egan*, 369 U.S. 60 (1962).

²*Department of Game v. The Puyallup Tribe, Inc.*, *supra*, is presently before this Court on a Petition for a Writ of Certiorari, October Term, 1967, Docket No. 247.

CONCLUSION

For the foregoing reasons, respondents respectfully urge that the petition for a writ of certiorari in this case be granted.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

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—
BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN
AFFAIRS, INC., AS AMICUS CURIAE, PRIOR TO CON-
SIDERATION OF PETITION FOR WRIT OF CERTIORARI
—

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IN THE
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**BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN
AFFAIRS, INC., AS AMICUS CURIAE, PRIOR TO CON-
SIDERATION OF PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 42(1) of the Supreme Court Rules,
counsel for the parties have consented in writing to
the filing of a brief by the Association on American
Indian Affairs, Inc. as *amicus curiae* in the above-
captioned case prior to consideration of the petition
for a writ of certiorari.

OPINIONS BELOW

The opinions below are printed in the Petition for Writ of Certiorari in Appendix B at A-14.¹

JURISDICTION

The Court has jurisdiction under 28 U.S.C. 1257 (3). The final judgment of the Supreme Court of the State of Washington was entered on March 13, 1967. The petition for a writ of certiorari was filed herein on June 12, 1967, less than 90 days thereafter in accordance with 28 U.S.C. 2101(c).²

STATEMENT OF INTEREST

The Association on American Indian Affairs, Inc. is a non-profit, membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and promoting the welfare of American Indians. It is today the largest Indian interest organization in the country. The Association's membership includes both Indians and non-Indians, and its activities are nationwide in scope. Because of its deep and longstanding concern with the issues of Indian treaty fishing rights and other questions of major interest to American Indians, the Association submitted a brief, *amicus curiae*, to the Washington Supreme Court in the instant case.

¹ References to portions of the Petition and the appendices thereto are hereafter referred to as "Pet. —" and "Pet. A —", respectively.

² Although the Washington Supreme Court announced its opinion on January 12, 1967, the 90-day period prescribed by 28 U.S.C. 2101(c) did not begin to run until March 13, 1967, the date on which that opinion became the final judgment of the court. Pet. A-67; *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22 (1924).

The decision of the lower court holding (1) that, despite treaty guarantees against such action, the State may restrict fishing by members of the Puyallup Tribe at sites located both within and without the reservation on the same basis as all other citizens, and (2) that the Puyallup Tribe is subject to suit absent consent of the tribe or the United States, raises serious and substantial questions about the continued vitality of Indian treaties and a hitherto well-settled principle of Indian law.

The depth of Indian feeling about treaty fishing rights is well illustrated by the response of some of the Northwestern tribes to attempts by the State of Oregon and Washington to restrict fishing at treaty protected sites. Resistance began with peaceful demonstrations and civil disobedience, but quickly escalated to the unfortunate level of armed resistance to State officers.³ No less intense is the feeling of the non-Indian community, thus creating the prospect of an ominous racial conformation.⁴

The issues raised by this case clearly are of national importance. Not only have the Indian tribes in Washington, Oregon and Idaho, whose fishing rights were guaranteed by similar treaties, much at stake, but also the United States in its treaty relations with Indians throughout the country is significantly affected. Reflecting such governmental interest, the Department of Justice filed a brief, *amicus curiae*, and participated in the oral argument in this case before the court be-

³ See, e.g., Portland, Oregon *Oregonian*, April 28 and May 5, 1966, printed in Exhibit A.

⁴ See, e.g., Astoria, Oregon *Daily Astorian* of April 26, 1966, printed in Exhibit B.

low. In addition, in an apparent attempt both to provide guidance and foster compromise, the Department of the Interior recently issued regulations purporting to control Indian treaty fishing.⁵ In like vein this Court on prior occasions has recognized the emergent need for resolving conflict between Indian fishing rights and the enforcement of State conservation laws. See, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942), and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962).

The decision of the Washington Supreme Court in this case simply cannot be reconciled with the holdings of the United States Court of Appeals for the Ninth Circuit interpreting similar treaty provisions in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F. 2d 169 (1963), *cert. denied*, 375 U.S. 829 (1964) and *Makah Indian Tribe v. Schoettler*, 192 F. 2d 224 (1951). Because of the legal uncertainty, economic instability and cultural shock which the Washington decision has caused, and for the reasons set forth hereinafter, the Association submits this brief, *amicus curiae*, prior to consideration of the petition for a writ of certiorari, and urges this Court to issue the writ and to reverse the ruling of the court below.

⁵ Although the Department's authority to restrict Indian treaty fishing is far from certain, see *Mason v. Sams*, 5 F. 2d 255 (W. D. Wash. 1925), and the new regulations (32 Fed. Reg. No. 136 (1967)) fail to provide any standard for exercising Secretarial control, their promulgation points up the need for clarification of the law by this Court.

STATEMENT OF THE CASE

This case started more than one hundred years ago. On December 26, 1854, Isaac S. Stephens, Governor and Superintendent of the Territory of Washington, and his delegation, met with representatives of "the tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets" to present a treaty providing for the cession to the United States of most of the vast area these Indians then occupied. Pet. A.1-9. Excepted out of the foregoing grant were (1) certain relatively small described tracts of land (Article II); and (2) "The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." (Article III)

After Governor Stephens had explained its provisions, the Indians agreed to execute the treaty, and representatives of the Puyallup Tribe were signatories thereto. Following ratification by the United States Senate, the Treaty of Medicine Creek was signed into law by President Pierce on April 10, 1855. 10 Stat. 1132.

The Puyallup Reservation, established in accordance with the Treaty of Medicine Creek, subsequently was expanded by the Executive Orders of January 20, 1857, and September 6, 1873. The Puyallup River flows through the reservation, emptying into Commencement Bay. Relying upon the treaty commitment described above, the Puyallup Indians fished in the waters of the Puyallup River and Commencement Bay within, and at usual and accustomed places outside, the reservation for almost a century with little or no interference.

In 1954, however, the State charged one Robert Satiacum, a Puyallup Indian, with fishing in violation of the Washington conservation laws, to wit: the possession of game fish during a closed season and the use of fixed nets to catch game fish at two locations, one a usual and accustomed fishing ground of the Puyallup Indians outside the reservation and the other a site inside the Puyallup Reservation, although on land not then in Indian ownership. The case eventually was appealed to the Washington Supreme Court, which affirmed a decision of the Superior Court dismissing the prosecution. *State v. Satiacum*, 50 Wash. 2d 524, 314 P. 2d 400 (1957).

Some ten years later, the State once again has sought to restrain members of the Puyallup Tribe from exercising fishing rights secured to them by the United States, this time through the device of a civil declaratory judgment action aimed at the entire tribal membership. Specifically, respondents instituted this action in the Superior Court of the State of Washington through the filing of a complaint alleging that Puyallup Indians were engaged in net fishing in the Puyallup River watershed and Commencement Bay in violation of the regulations of the State Department of Fisheries, and requesting a judgment declaring that the Puyallup Tribe, Inc.⁶ and certain named individual defendants were not entitled to any privileges and immunities from application of State conservation measures. Petitioner answered by challenging the court's jurisdiction and asserting, as an affirmative defense, that neither the Puyallup Tribe nor the individual

⁶ As the Washington Supreme Court pointed out: "The case caption is erroneous, there being no entity known as The Puyallup Tribe, Inc., a corporation." Pet. A-36 (fn.).

defendants as members thereof are subject to State conservation laws when exercising fishing rights reserved to such tribe by the Treaty of Medicine Creek.

On May 27, 1965, the Superior Court entered its Memorandum Decision holding (1) that there is no Puyallup Tribe which succeeds in interest to the rights of the Puyallup signers of the Treaty of Medicine Creek, (2) that the Puyallup Reservation, established in accordance with that treaty, has ceased to exist, and (3) that, despite its finding that Indian fishing (in 1964) accounted for only 3-5% of the total catch, the regulations sought to be enforced by the State were reasonably necessary for the preservation of salmon and steelhead fish. Subsequently, the court entered a decree enjoining all members of the Puyallup Tribe from fishing in the Puyallup River watershed and Commencement Bay except in compliance with the rules and regulations of the Department of Fisheries.

Upon appeal by the tribe, the Washington Supreme Court reversed the lower court's finding that the Puyallup Tribe no longer was in being, but held (1) that the Puyallup Reservation had ceased to exist, and (2) that members of the Puyallup Tribe exercising treaty-reserved fishing rights are subject to restrictions by the State not shown to be indispensable to preservation of the fishery. Although the petitioner and *amicus curiae* again challenged the Superior Court's jurisdiction, the court below failed to rule upon the key question of whether the Puyallup Tribe enjoys sovereign immunity from suit. Because the original injunction, entered by the lower court, reflecting its determination that the Puyallup Indians had no treaty fishing rights, prohibited members of petitioner from fishing contrary

to all regulations of the Department, the Supreme Court remanded the case "for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery." Pet. A-52.

On June 2, 1967, the Superior Court entered its amended injunction permanently enjoining all members of petitioner tribe "from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington." Pet. A-68.

QUESTIONS PRESENTED

- I. WHETHER INDIANS EXERCISING THE RIGHTS GUARANTEED PURSUANT TO TREATY WITH THE UNITED STATES TO FISH WITHIN THE RESERVATION BOUNDARIES AND AT USUAL AND ACCUSTOMED SITES LOCATED OUTSIDE OF THE RESERVATION ARE SUBJECT TO STATE REGULATIONS NOT SHOWN TO BE INDISPENSABLE TO THE PRESERVATION OF THE FISHERY.
- II. WHETHER A RECOGNIZED TRIBE OF AMERICAN INDIANS MAY BE SUED WITHOUT ITS CONSENT OR THAT OF THE UNITED STATES.

REASONS FOR GRANTING THE WRIT

- I. THE DECISION OF THE SUPREME COURT OF THE STATE OF WASHINGTON CONTRAVENES THE TREATY OF MEDICINE CREEK.

The right of members of the Puyallup Tribe to take fish within the boundaries of its reservation and at usual and accustomed places located outside of that area derives from a solemn contractual commitment made by the United States to the forebears of peti-

tioner tribe. This commitment furnished a major part of the consideration for the cession to the United States of a substantial and valuable portion of the State of Washington previously used and occupied by Puyallup Indians, and thus constitutes a compensable property interest, the taking of which may not be accomplished without action of Congress and payment of just compensation. *Whitefoot v. United States*, 293 F. 2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); see *United States v. Winans*, 198 U.S. 371, 381 (1905); *Menominee Tribe of Indians v. United States*, No. 339-65 (Ct. Cl. April 14, 1967); *The Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (Ct. Cl. 1959); Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo. Wash. L. Rev. 504, 518 (1964). The decision of the lower court, sanctioning imposition of State fishing regulations not shown to be indispensable to the preservation of the fishery with respect to members of petitioner tribe exercising such rights, constitutes an unlawful taking of the property of the Puyallup Tribe and contravenes the Treaty of Medicine Creek. Such disregard for the applicable law cannot be allowed to stand.

A. Members of the Puyallup Tribe Fishing Within the Exterior Boundaries of the Puyallup Reservation Are Not Subject to State Regulation

The right of Indians freely to fish within the boundaries of reservations established for their benefit, without interference by State authorities, uniformly has been upheld by the courts. *United States v. Winans*, 198 U.S. 371 (1905); *Moore v. United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *Mason v. Sams*, 5 F. 2d 255 (W.D. Wash. 1925); *In re Blackbird*, 109 Fed. 139 (W.D. Wis. 1901); see *Or-*

ganized *Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). Since Indian treaties contemplate retention by the tribes of all rights previously existing in lands thereby reserved to them, the right to fish within the boundaries of the reservation exclusive of State restrictions does not depend upon the existence of express treaty language so providing. *United States v. Winans, supra*; *Moore v. United States, supra*; *Mason v. Sams, supra*; See *Winters v. United States*, 207 U.S. 564 (1908).

While not challenging this principle, the court below ruled that the members of the Puyallup Tribe no longer have "any special or treaty rights to fish" within reservation boundaries because "there is no longer a reservation." Pet. A-51. Such a holding is contrary to the overwhelming weight of authority requiring Congressional sanction for dissolution of an Indian reservation (which approval may not be found in the allotment of the land or the conveyance of fee patents, the factors cited by the Washington Supreme Court), and, accordingly, is erroneous as a matter of law.

This Court has made it abundantly clear that only Congress has the power to abolish an Indian reservation. *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962); *Creek County v. Seber*, 318 U.S. 705 (1943); *United States v. Celestine*, 215 U.S. 278, 285 (1909), "... when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.")

Contrary to the lower court's finding, the conveyance of patents in fee to reservation land does not reflect a Congressional purpose to discontinue the special status accorded Indian reservations, as is conclusively evi-

denced by the Act of June 25, 1948, 62 Stat. 757, 18 U.S.C. 1151, as amended. Under this statute, Congress defined "Indian Country" for purposes of assertion of Federal jurisdiction to include:

all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation. . . (Emphasis added.)

The application of Federal law to Indians on lands within a reservation patented and sold to a non-Indian, and the prohibition against exercise of State jurisdiction in such situations pursuant to the 1948 Act, repeatedly has been sustained. *Seymour v. Superintendent, supra*; *Guith v. United States*, 230 F. 2d 481 (9th Cir. 1956); *State v. District Court*, 125 Mont. 398, 239 P. 2d 272 (1951).

Moreover, the cases are legion to the effect that allotment does not oust exclusive Federal jurisdiction over Indian reservations with respect to matters involving Indians or otherwise so erase reservation boundaries as to sanction the application therein of State laws. *Seymour v. Superintendent, supra*; *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Celestine, supra*. Indeed, with specific reference to the Puyallup Reservation, this Court in *United States v. Celestine, supra*, quoted with approval from the opinion of Judge (subsequently Mr. Justice) McKenna in *Eells v. Ross*, 64 Fed. 417 (9th Cir. 1894) as follows (215 U.S. at 287):

'It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and

that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (*The Kansas Indians* [*Blue Jacket v. Johnson County*] 5 Wall. 737, 18 L. ed. 667), and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. *Some of the restraints of a reservation may be inconsistent with the rights of citizens.. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain.* (Emphasis added.)

Eells v. Ross, supra, affirmed the continued existence of the Puyallup Reservation following enactment of the Puyallup Allotment Act.

In marked contrast to the general legislation relied upon by the court below, when Congress actually has decided to end the status of an Indian reservation and thereby to eliminate special rights secured to tribal members by Federal treaty, its intention to do so has been clear and precise. See e.g., Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. 564; Menominee Termination Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. 891. Relying upon the manifest purpose of the termination acts—dissolution of tribal property, accession of State jurisdiction and severance of all Federal services—the courts have discerned in such legislation a clear Congressional sanction for the nullification of the treaty-protected rights previously enjoyed by the Klamath and Menominee tribes.

Klamath and Modoc Tribes v. Maison, 338 F. 2d 620 (9th Cir. 1964); *State v. Sanapaw*, 21 Wisc. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied*, 377 U.S. 999 (1964). No such legislation has been enacted with respect to the Puyallup Tribe, and no such Congressional imprimatur has been put upon the treaty violation practiced in this case by the State of Washington.

In short, Congress, which has the power, has not abolished the Puyallup Reservation, and the Supreme Court of the State of Washington has not the authority to do so. With respect to fishing on the reservation by Puyallup Indians, the decision of the lower court is in irreconcilable conflict with the Treaty of Medicine Creek and must be reversed.

B. Members of the Puyallup Tribe Fishing "At All Usual and Accustomed Grounds and Stations" Outside the Puyallup Reservation Are Subject Only to Regulations Demonstrated by the State to be Indispensable to the Conservation of the Fish

Under Article III of the Treaty of Medicine Creek, the United States pledged for the benefit, *inter alia*, of petitioner's members that:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory

There is no dispute that the fishing at issue in the instant case, other than that conducted within the reservation, occurred at such "usual and accustomed" sites. The lower court concluded, however, that Puyallup Indians may be restricted by the State in the exercise of their off-reservation fishing rights by application of so-called "reasonable and necessary" regula-

tions. This decision is premised upon a fundamental misconception both of the rights secured to petitioner by the Treaty of Medicine Creek and of the burden which the State must bear in order to justify imposition of restrictions upon members of the Puyallup Tribe.

As the historical context makes plain, the purpose of Article III was (1) to preserve to the signatory tribes rights, already existing, to fish freely at "usual and accustomed" places located outside the reservations to be established in accordance with the treaty, and (2) to grant to "citizens" the privilege, not formerly enjoyed, to fish at such places "in common" with the members of the tribes. Of the identical clause in the Yakima Treaty of June 9, 1855, 12 Stat. 951, this Court explained in *United States v. Winans*, 198 U.S. 371, 381 (1905):

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended; not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted.

The new condition referred to above, of course, was the arrival of the settlers. In anticipation of this event, the treaty required the Indians to allow the "citizens" to share the former's usual and accustomed fishing places. But the treaty no less clearly recog-

nized and promised to secure the right of the Indians—limited only by the requirement as to common use—to continue to take fish at such locations.

Recognition of their continuing rights requires that restriction upon Indian fishing at usual and accustomed off-reservation sites be limited to those regulations which are indispensable to the accomplishment of conservation objectives which cannot otherwise be attained. *Maison v. Confederated Tribes of the Umatilla Reservation*, 314 Fed. 169 (9th Cir. 1963), cert. denied, 375 U.S. 829 (1964). As the court pointed out in the *Umatilla* case, conservation necessarily involves the allocation of a limited resource among those demanding to share in it—in this case commercial and sports fishermen, who in 1964 accounted for some 95%-97% of the total salmon catch, as well as Indians. Since non-Indians have only a mere privilege to take fish, *Geer v. Connecticut*, 161 U.S. 519, 532 (1896), as contrasted with the treaty right vested in members of the Puyallup Tribe, "restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others." *Maison v. Confederated Tribes of the Umatilla Reservation*, *supra*, at 173.

Unlike the Ninth Circuit, the court below made no inquiry into the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing; or by other means not having so severe an impact upon members of the petitioner tribe. Similarly, the court below did not consider whether preservation of the Puyallup River fishery, even assuming the need for regulation, requires so severe a curtailment of Indian

fishing as the State has imposed. (One issue not resolved by the Washington Supreme Court, for example, is whether the goal of conservation could not be attained through imposition of regulations designed to effect the minimum escapement level necessary for propagation. See *Makah Indian Tribe v. Schoettler*, 192 F. 2d 224, 225 (9th Cir. 1951). In short, by adopting a "reasonable and necessary" standard, the lower court ruling affords members of the Puyallup Tribe no greater rights than those guaranteed to all persons in the State of Washington under the Fourteenth Amendment. *Torao Takahaski v. Fish and Game Commission*, 334 U.S. 410 (1948); *Begay v. Sawtelle*, 53 Ariz. 304, 88 P. 2d 999 (1939).

This decision is patently contrary to the manifest intent of the treaty, to wit: to provide a small and distinct racial minority with legally enforceable rights, as opposed to privileges protected only by the requirements of equal treatment and the political process. As the facts of this case make painfully clear, the State of Washington, rather than restrict those more populous and powerful groups which account for the vast majority of salmon caught each year or those who pollute the waters in which the fish breed, has sought to prohibit through regulation fishing by a handful of Indians. If the Treaty of Medicine Creek is to have continued meaning, such an effort cannot be allowed to succeed.

II. THE RULING OF THE SUPREME COURT OF THE STATE OF WASHINGTON WITH RESPECT TO THE AUTHORITY OF THE STATES TO RESTRICT TREATY PROTECTED INDIAN FISHING IS IN DIRECT CONFLICT WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS AND OF OTHER STATE COURTS.

The holding of the court below that members of the Puyallup Tribe exercising their rights pursuant to the Treaty of Medicine Creek to fish "at all Usual and Accustomed Grounds and Stations" are subject to reasonable and necessary State regulations is in direct and irreconcilable conflict with the decisions of the Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Idaho.

As has been discussed, the Ninth Circuit in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, *supra*, considering identical treaty language, held that only such State conservation measures as are indispensable to the preservation of the fish resources may be enforced against Indians fishing under sanction of a treaty with the United States. Accord, *Makah Indian Tribe v. Schoettler*, *supra*; *Confederated Tribes of the Umatilla Reservation v. Maison*, 262 F. Supp. 871 (D. Ore. 1966). On the other hand, the Idaho Supreme Court, in a case involving Indian hunting, decided that the State of Idaho could not impose any restrictions upon exercise of rights reserved by treaty with the United States. *State v. Arthur*, 74 Idaho 251, 261 P. 2d 135 (1953), *cert. denied*, 347 U.S. 937 (1954). The Court of Claims reached the same result in regard to the authority of the State of Wisconsin in *Menominee Tribe of Indians v. United States*, No. 339-65 (Ct. Cl. April 14, 1967).

In the instant case, the Washington Supreme Court explicitly rejected the *Umatilla* standard, character-

izing that test as "completely unworkable" (Pet. A-49), and did not even consider the more stringent *Arthur* rule. Instead, the court below adopted a "reasonable and necessary" test which does not require inquiry into the feasibility of accomplishing conservation objectives through means other than restriction of Indian fishing.

These contradictory decisions have produced an intolerable measure of uncertainty with respect to the exercise of basic rights secured by treaties with the United States. More particularly, members of the Puyallup Tribe are now subject to criminal prosecution (contempt of the injunction and/or violation of the fishing regulations) for acts which, in accordance with the law in the Ninth Circuit, may well enjoy immunity from State control. In addition, a member of an Idaho tribe having treaty fishing rights may not be prosecuted by that State even though his action, if performed in Washington by himself or by a member of a Washington tribe under aegis of identical treaty language, would be subject to criminal penalty.

It is respectfully submitted that the irreconcilable conflict between the decision of the Washington Supreme Court in this case and earlier holdings of the United States Court of Appeals having jurisdiction in the State of Washington makes essential the establishment by this Court of a consistent, uniform standard delineating the proper limits of State authority to restrict Indian treaty fishing. For the reasons discussed above, the Association, as *amicus curiae*, further urges that this Court adopt the Ninth Circuit rule as the governing standard for regulation of off-reservation Indian fishing at usual and accustomed sites pursuant to treaty with the United States.

III. THE DECISION OF THE WASHINGTON STATE SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT AND THE LOWER FEDERAL COURTS HOLDING THAT AN INDIAN TRIBE IS NOT SUBJECT TO SUIT WITHOUT CONSENT BY THE TRIBE OR THE UNITED STATES.

The immunity of Indian tribes from suit, absent consent of the tribe or the United States, is too firmly established in the law now to be questioned. *United States v. United Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Maryland Casualty Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F. 2d 517 (5th Cir. 1966); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F. 2d 529 (8th Cir. 1967). As this Court made plain in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. at 512-3:

The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations [the Choctaws] are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal property did. (Footnotes omitted)

As a matter of fact and law, the United States has not authorized suits against the Puyallup Tribe, and the record herein contains no indication to the contrary. The petitioner tribe not only has never consented to be sued, but has vigorously opposed assertion of jurisdiction in this case on grounds of sovereign immunity.

The conclusion, therefore, is inescapable that the Puyallup Tribe (which has never been dissolved) may not be sued in the courts of the State of Washington.

without its consent or that of the United States. Nonetheless, the Washington Supreme Court, without even discussing the point, upheld the lower court's jurisdiction over the petitioner tribe.⁷ Unless that unprecedented decision is reversed by this Court, it may serve as the predicate for further erosion by State courts of tribal immunity, thereby exposing the limited resources of Indian governments to indiscriminate suits.

CONCLUSION

For the reasons set forth in this brief, the Association on American Indian Affairs, Inc., as *amicus curiae*, urges this Court to issue a writ of certiorari to the Supreme Court of the State of Washington and to reverse the decision of that court.

Respectfully submitted,

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*General Counsel, Association
on American Indian Affairs, Inc.
Amicus Curiae*

⁷ The Superior Court had ruled that the Puyallup Tribe no longer exists. (See Pet. A 14-34). The Washington Supreme Court overruled the lower court on this point, but did not go on to consider the issue of immunity from suit which necessarily follows from the court's determination of continued tribal existence and which petitioner tribe vigorously asserted.

EXHIBIT A

PORTLAND, OREG.
OREGONIAN

D. 216,367 — S. 356,753

May 5, 1966

**INDIANS FIGHT OFF RAID
BY STATE GAME OFFICERS**

STEVENSON, Wash. (Special)—Rebel Indians were claiming Wednesday they had repulsed an amphibious "sneak attack" by Washington state game protectors on Indian fishing grounds at Cooks Landing.

An Indian spokesman said several shots were fired near midnight Tuesday at boats attempting to haul Indian fishing nets out of the river.

J.E. Lasater, assistant director of the Washington Department of Fisheries, verified some of the information reported by the Indians.

According to Leo Alexander, secretary for the Columbia River Fish Commission of the Yakima Indian Nation, several patrol officers in two boats Tuesday night nosed into the Cooks Landing area, where the rebel Indian group has set up "camp."

Alexander claimed the boats were attempting to steal nets. He said Indian sentries shouted warnings at the men in the boats but that one boat continued nosing in to the area where Indian boats are anchored.

SENTRIES FIRE SHOTS

The sentries then fired shots from high-powered rifles into the water near the boat and the boats took off, Alexander reported.

Lasater said that, according to the report turned in by the game protectors, one state boat was making its way upstream on routine patrol and that the boat passed the outer-end float of a net "in the dark."

According to the report, there were no warning shouts from the Indians but game protectors did hear one shot and saw a splash near the end of their boat.

The rebel group, using armed guards, has continued daily fishing above Bonneville Dam—an illegal activity in the eyes of Washington state fish officials. The Indians claim they are acting under rights granted to them by treaty.

PORTLAND, OREG.
OREGONIAN

D. 216,367 — S. 356,753

April 28, 1966

INDIANS FISH UNDER GUARD

Cook, Wash. (Special)—All was calm on the Columbia Wednesday as Alvin Settler's Indians continued to fish under armed guard.

Washington Fisheries and Game Department agents made no effort to interfere with the two set nets anchored to the three-acre site of Indian land, which Settler claims has the sanctity of an Indian reservation.

Spokesmen in Olympia said no warrants had been sought and none would be as long as the armed movement did not spread.

Settler, "attorney general of the group", Wednesday invited press, radio, television and some Washington and Oregon political candidates to a salmon bake at the Cook site at 12 o'clock noon Friday.

The Indians will stage ceremonial dances in honor of their five-man "Columbia River Fish Commission" as they pull their nets out of the river in compliance with their own conservation regulations and leave them out until Sunday noon, Settler said.

The commission is not recognized by the Yakima Tribal Council, which has a slightly different set of conservation regulations. State officials don't recognize either group's regulations.

EXHIBIT B

ASTORIA, OREG.
DAILY ASTORIAN

D. 6,280

April 26, 1966

ARMED INDIANS INTOLERABLE

The upriver Indians had better put away their rifles before someone gets hurt and they find themselves in more serious trouble than they are in now.

This show of armed defiance of Oregon and Washington fishery authorities is stupid. It is nothing more than a gesture, but it is going to make some white people angry and could lead to bloodshed.

If the Indians can't win in court, they can't win by armed force, and they ought to know it by now.

A sure way to have their treaty rights extinguished is by an attempt to use arms to enforce them. The government is not going to tolerate an armed, independent Indian nation which can threaten to shoot people it considers to be interfering with its rights. If the Indians consider themselves independent to an extent that they have a right to bear arms, obviously they will have to be suppressed.

The officials of the federal Indian Affairs Bureau, by encouraging the Indians to defy Oregon and Washington fishery authorities rather than cooperating with these agencies, have done them a disservice.

Presumably these officials did not go so far as to advise the Indians to take up arms, but they certainly encouraged the Indians to adopt an attitude that they were superior to state law. These federal advisers to the Indians had better persuade them to put down their guns fast.

Nos. 246, 247, 818

NOV 2, 1967

RECEIVED

In the Supreme Court of the United States

OCTOBER TERM, 1967

HERMAN MOSEB, ET AL., APPELLANTS

v.

THE STATE OF WASHINGTON, ET AL.

THE PUYALLUP TRIBE, PETITIONER

v.

**DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
ET AL.**

NUGENT KAUTE, ET AL., PETITIONERS

v.

**DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
ET AL.**

**ON APPEAL FROM, AND PETITIONS FOR WRITS OF HABEAS CORPUS
TO, THE SUPREME COURT OF THE STATE OF WASHINGTON**

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

**ERWIN N. CAHNSWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ET AL., APPELLANTS

v.

THE STATE OF WASHINGTON, ET AL.

No. 247

THE PUYALLUP TRIBE, PETITIONER

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

ET AL.

No. 319

NUGENT KAUTZ, ET AL., PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

ET AL.

*ON APPEAL FROM, AND PETITIONS FOR WRITS OF CERTIORARI
TO, THE SUPREME COURT OF THE STATE OF WASHINGTON*

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of October 9, 1967, the Solicitor General was invited to express the views of the United

States with respect to these cases involving the off-reservation fishing rights of certain Indian tribes in the State of Washington.

Each of the cases was initiated by the Washington Game and Fisheries Departments to enjoin Indians who claim immunity under federal treaties from conducting their fishing operations in violation of the conservation laws of the State. In No. 246 the defendants (petitioners here) are members of the Muckleshoot Tribe asserting fishing rights under the Point Elliot Treaty of January 22, 1855 (12 Stat. 927); in No. 247 and No. 319, the defendants are Puyallup Indians and Nisqually Indians, respectively, asserting fishing rights under the Treaty of Medicine Creek, signed December 26, 1854 (10 Stat. 1132). The Supreme Court of Washington held in No. 246 that the Muckleshoot Indians had no rights under the Point Elliot Treaty¹ (J.S. A46-A53).² In No. 247 and No. 319, the State court recognized that the beneficiaries of the Treaty of Medicine Creek still enjoyed "a right to fish at all usual and accustomed grounds," but held the right subject to regulation under State conservation laws "reasonable and necessary for the preservation of the fishery" (J.S. A24-A25, A43-A44).

¹ The State Supreme Court held that the correctness of the trial court's factual finding on this point could not be considered on appeal because the issue had not been properly raised in the assignment of error (J.S. A48).

² All of our references are to the Appendix to the Jurisdictional Statement in No. 246 which reproduces the opinions of the court below in all three cases.

While the issue seems precluded in No. 246, the other two cases present a question of importance: the extent of off-reservation fishing rights which have been guaranteed to the Indians by federal treaties. The matter affects not only the Indians now before the Court, but also more than a dozen other Tribes in the Pacific Northwest, beneficiaries of several treaties with almost identical provisions.³ Although this Court has had occasion to speak to the question, it remains largely unresolved. The problem is acute, provoking bitter disputes and conflicting judicial decisions. Currently, the Secretary of the Interior has undertaken to regulate Indian fishing in a manner which provides for cooperation with State authorities,⁴ but those efforts are embarrassed by the absence of a definitive ruling on the scope of the rights secured by treaty. In the circumstances, we suggest the Court might appropriately grant certiorari.

The issue arises because many treaties with Indian tribes expressly reserved to them with respect to lands

³ See Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty with the Nez Perce (12 Stat. 957), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinalt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III. <

⁴ We reproduce the Secretary's present regulations in an appendix, *infra*, pp. 7-17. It will be noted that Section 256.2 contemplates detailed area regulations—which have not yet been promulgated. Of course, the regulations do not purport to diminish or enlarge the rights guaranteed by treaty. See § 256.7 (b), (c).

ceded to the United States the right "to take fish at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory."⁵ Some have read this language as securing to the Indians only a right of equal access to certain fisheries open to others, which subsists only so long, and so far, as ordinary citizens are permitted to fish there. That view, we believe, has been rejected by this Court. *E.g.*, *United States v. Winans*, 198 U.S. 371; *Seufert Bros. Co. v. United States*, 249 U.S. 194; *Tulee v. Washington*, 315 U.S. 681. But the holding that these treaty provisions do more than exempt the Indians from discriminatory State laws does not end the matter. It remains to define the extent of the right reserved.

Do the treaties secure an absolute and unqualified right to fish at specified locations which the State is forbidden to inhibit whatever the consequences, as the Idaho Supreme Court seems to have held? See *State v. Arthur*, 74 Idaho 251, 261 P. 2d 135. Is the right subject to restriction by the State when it is "indispensable" to do so in the interest of necessary conservation, if that end "cannot be accomplished by a restriction of the fishing of others," as the Court of Appeals for the Ninth Circuit held in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169, 173? Or does the State merely bear the burden of showing that a restriction is generally neces-

⁵ This is the language of the Treaty of Medicine Creek, involved in Nos. 247 and 319. The provision of the Point Elliot Treaty invoked in No. 246 is the same, except for the immaterial omission of the adjective "all" preceeding "usual and accustomed grounds." The other treaties cited in n. 3, *supra*, contain substantially identical provisions.

sary to conserve the fishery, without inquiring whether it is possible to exempt the Indians with respect to the locations where their treaty rights apply? That seems to have been the approach of the Washington Supreme Court in the cases at bar. We believe the opinions below give inadequate recognition to the federally secured fishing rights of the Indians of the Pacific Northwest. At all events, however, these and other questions press for authoritative resolution and we submit the pending cases offer an appropriate occasion to end the conflict of decisions by announcing the controlling standards.

CONCLUSION

Accordingly, we urge the Court to grant the petitions for certiorari in Nos. 247 and 319.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

APPENDIX

TITLE 25—INDIANS

Chapter I—Bureau of Indian Affairs, Department of the Interior

SUBCHAPTER W—MISCELLANEOUS ACTIVITIES

PART 256—OFF-RESERVATION TREATY FISHING

On page 8969 of the FEDERAL REGISTER of July 16, 1965, there was published a notice of intent to add a new Part 255 to Chapter I, Title 25, Code of Federal Regulations, and the text of the proposed regulations. The purpose of the new part was to provide a framework within which the exercise of off-reservation fishing rights secured to certain Indian tribes under treaties with the United States might be subjected to Federal regulation and control when required for conservation of the fishery resources for the benefit of the Indians and others having interests therein.

Interested persons were given an opportunity to submit data, views, or suggestions pertaining thereto within 30 days from the date of publication of the notice in the FEDERAL REGISTER. Numerous comments were received from several State Governors, State agencies, tribes, and others. These have all been considered and it has been determined that the proposed regulations should be issued in a modified form. The principal changes, other than editorial, are as follows:

The regulations have been assigned Part 256 since Part 255 has been assigned to a different subject.

Section 256.1 has been revised to more precisely and succinctly state the purposes of the regulations. The definition section has been omitted as unnecessary in the light of other changes adopted.

The section dealing with issuance of area regulations (§ 256.2) has been revised. Such regulations may be issued by the Secretary for those areas which he believes require them to assure adequate conservation and wise utilization of the fishery resources upon request of an Indian tribe, request of a State Governor, or his own motion. The Secretary may incorporate state laws or approved tribal regulations if he finds these to be consistent with the treaty and with conservation requirements.

Provisions expressly calling for recommendations to the Secretary by the Commissioner of Indian Affairs and the Commissioner of Fish and Wildlife have been deleted because they concerned matters of internal administration not appropriate for treatment by regulations. It is contemplated that, except in emergency situations, interested parties will be afforded an opportunity to submit comments and information in connection with the rule-making process and that any hearings or actions by the Commissioner of Indian Affairs and the Commissioner of Fish and Wildlife will be as agents of the Secretary in preparing a record upon which he can act. Provision has been made for the immediate promulgation of regulations if emergency conditions require. Parties will then be afforded an opportunity to submit views in support of requests for modification of such emergency regulations.

The area regulations may include requirements for reporting catch statistics which are deemed necessary for management purposes by State agencies as well as those needed by the Secretary.

Provisions applicable to identification cards (§ 256.3) have been revised to provide that these will be identification cards rather than fishing permits. They will be issued as prima facie evidence of the holder's entitlement to exercise a treaty-secured fishing right. The Commissioner of Indian Affairs may cause a government card to be issued or he may authorize use of tribally issued cards. The latter must be countersigned by a Bureau of Indian Affairs official. Copies of card forms and lists of issuing or countersigning officers must be furnished to State agencies. The deadline for requiring an approved tribal roll is advanced to January 1, 1970.

The requirement of identification of fishing gear (§ 256.4) is not limited to gear which is not in the Indian's immediate personal possession. The presumption that unmarked gear is not being used in the exercise of a treaty right applies only in the absence of proof to the contrary.

The enforcement provision (§ 256.6) is changed to provide for enforcement by tribal courts, Courts of Indian Offenses established under Part 11 of CFR Title 25 or special Courts of Indian Fishing Offenses to be established in accordance with said Part 11.

Except for § 256.3(g) and § 256.5, Part 256 shall become effective 30 days after its publication in the FEDERAL REGISTER. Section 256.3(g) and § 256.5 shall become effective 60 days after such publication.

STEWART L. UDALL,
Secretary of the Interior.

JULY 10, 1967.

Part 256 is adopted to read as follows:

Sec.

- 256.1 Purpose.
- 256.2 Area regulations.
- 256.3 Identification cards.
- 256.4 Identification of fishing equipment.
- 256.5 Use of unauthorized helpers or agents.
- 256.6 Enforcement and penalties.
- 256.7 Savings provisions.

AUTHORITY: The provisions of this Part 256 issued under 25 U.S.C. 2 and 9; 5 U.S.C. 301.

§ 256.1 Purpose.

(a) The purposes of these regulations (Part 256) are:

(1) To assist in protecting the off-reservation non-exclusive fishing rights which are secured to certain Indian tribes by their treaties with the United States;

(2) To promote the proper management, conservation and protection of fisheries resources which are subject to such treaties of the United States;

(3) To provide for determination of restrictions on the manner of exercising nonexclusive fishing privileges under rights secured to Indian tribes by such treaties of the United States necessary for conservation of the fisheries resources;

(4) To assist in the orderly administration of Indian Affairs;

(5) To encourage consultation and cooperation between the states and Indian tribes in the management and improvement of fisheries resources affected by such treaties;

(6) To assist the states in enforcing their laws and regulations for the management and conservation of fisheries resources in a manner compatible with the treaties of the United States which are applicable to such resources.

(b) The conservation regulations of this Part 256 are found to be necessary to assure that the non-exclusive rights secured to certain Indian tribes by treaties of the United States to fish at usual and accustomed places outside the boundaries of an Indian reservation shall be protected and preserved for the benefit of present and future members of such tribes in a manner consistent with the nonexclusive character of such rights. Any exercise of an Indian off-reservation treaty fishing right shall be in accordance with this Part 256 and any applicable area regulations issued hereunder.

§ 256.2 Area regulations.

(a) The Secretary of the Interior may upon request of an Indian tribe, request of a State Governor, or upon his own motion, and upon finding that Federal regulation of Indian fishing in any waters in which Indians have a treaty-secured nonexclusive fishing right is necessary to assure the conservation and wise utilization of the fishery resources for the present and future use and enjoyment of the Indians and other persons entitled thereto, promulgate regulations to govern the exercise of such treaty-secured fishing right in such waters for the purpose of preventing, in conjunction with appropriate State conservation laws and regulations governing fishing by persons not fishing under treaty rights, the deterioration of the fishery resources.

(b) In formulating such regulations the Secretary of the Interior may incorporate such State laws or regulations, or such tribal regulations as have been approved by the Commissioner of Indian Affairs, as he finds to be consistent with the Indians' rights under the Treaty and the conservation of the fishery resources.

(c) Before promulgating such regulations the Secretary of the Interior will seek the views of the affected Indian tribes, of the fish or game management agency or agencies of any affected State, and of other interested persons. Except in emergencies where the Secretary finds that the exigencies require the promulgation of regulations to be effective immediately, a notice of proposed rule making will be published in the **FEDERAL REGISTER** in accordance with 5 U.S.C. 553 to afford an opportunity to submit comments and information, at such times and in such manner as may be specified in the notice. In the event of the emergency promulgation of regulations, interested persons will be afforded, as soon as possible, an opportunity to request amendment or revocation thereof.

(d) Any regulations issued pursuant to this section shall contain provisions for invoking emergency closures or restrictions or the relaxation thereof at the field level when necessary or appropriate to meet conditions not foreseeable at the time the regulations were issued.

(e) Regulations issued pursuant to this § 256.2 may include such requirements for recording and reporting catch statistics as the appropriate state fish and game agencies or the Secretary of the Interior deem necessary for effective fishery management.

§ 256.3 Identification cards.

(a) The Commissioner of Indian Affairs shall arrange for the issuance of an appropriate identification card to any Indian entitled thereto as prima facie evidence that the authorized holder thereof is entitled to exercise the fishing rights secured by the treaty designated thereon. The Commissioner may cause a federal card to be issued for this purpose or may authorize the issuance of cards by

proper tribal authorities: *Provided*, That any such tribal cards shall be countersigned by an authorized officer of the Bureau of Indian Affairs certifying that the person named on the card is a member of the tribe issuing such card and that said tribe is recognized by the Bureau of Indian Affairs as having fishing rights under the treaty specified on such card. Copies of the form of any identification card authorized pursuant to this section and a list of the authorized Bureau of Indian Affairs issuing or countersigning officials shall be furnished to the fisheries management and enforcement agencies of any State in which such fishing rights may be exercised.

(b) No such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior: *Provided*, That until January 1, 1970, a temporary card may be issued to any member of a tribe not having an approved current membership roll who submits evidence of his entitlement thereto satisfactory to the issuing officer and in the case of a tribally issued card, to the countersigning officer. Any Indian claiming to have been wrongfully denied a card may appeal the decision in accordance with Part 2 of this chapter.

(c) No person shall be issued an identification card on the basis of membership in more than one tribe at any one time.

(d) Each card shall state the name, address, tribal affiliation and enrollment number (if any) of the holder, identify the treaty under which the holder is entitled to fishing rights, contain such additional personal identification data as is required on fishing licenses issued under the law of the State or States within which it is used, and be signed by the issuing officer and by the holder.

(e) No charge or fee of any kind shall be imposed by the Commissioner of Indian Affairs for the issuance of an identification card hereunder: *Provided*, That this shall not prevent any Indian tribe from imposing any fee or tax which it may otherwise be authorized to impose upon the exercise of any tribal fishing right.

(f) All cards issued by the Commissioner of Indian Affairs pursuant to this Part 256 shall be, and remain the property of the United States and may be re-taken by any Federal, State, or tribal enforcement officer from any unauthorized holder. Any card so re-taken shall be immediately forwarded to the officer who issued it.

(g) The failure of any person who claims to be entitled to the benefits of a treaty fishing right to have such a card in his immediate personal possession while fishing or engaging in other activity in the claimed exercise of such right to display it upon request to any Federal, State, or tribal enforcement officer shall be prima facie evidence that the person is not entitled to exercise an Indian fishing right under a treaty of the United States.

(h) No person shall allow any use of his identification card by any other person.

§ 256.4 Identification of fishing equipment.

All fishing gear or other equipment used in the exercise of any off-reservation treaty fishing right shall be marked in such manner as shall be prescribed in regulations issued pursuant to § 256.2 hereof to disclose the identity of its owner or user. In the absence of proof to the contrary, any fishing gear which is not so marked or labeled shall be presumed not to be used in the exercise of an off-reservation treaty fishing right and shall be subject to control or seizure under State law.

§ 256.5 Use of unauthorized helpers or agents.

No Indian shall, while exercising off-reservations treaty-secured fishing rights, permit any person 12 years of age or older other than the authorized holder of a currently valid identification card issued pursuant to this Part 256 to fish for him, assist him in fishing, or use any gear or fishing location identified as his gear or location pursuant to this Part 256.

§ 256.6 Enforcement and penalties.

(a) Any Indian tribe with a tribal court may confer jurisdiction upon such court to punish violations by its members of this Part 256 or of the area regulations issued pursuant thereto. Jurisdiction is hereby conferred upon each Court of Indian Offenses established pursuant to Part 11 of this chapter to punish such violations by members of tribes whose reservations are under the jurisdiction of such court. Courts of Indian Fishing Offenses may be created pursuant to Part 11 of this chapter to punish such violations by members of any tribe or group of tribes for which there is otherwise no Court of Indian Offenses or tribal court with jurisdiction to enforce this Part 256. The provisions of Part 11 of this chapter shall apply to any such court with respect to the exercise of its jurisdiction to enforce this Part 256. All jurisdiction conferred by this section shall apply without regard to any territorial limitations otherwise applicable to the jurisdiction of such court.

(b) Acceptance or use of an identification card issued pursuant to this Part 256 or use of any fishing gear marked or identified pursuant thereto shall constitute an acknowledgment that the fishing done under such card or with such gear is in the claimed exercise of a tribal fishing right and is subject to the jurisdiction of the tribal court, Court of Indian Offenses,

or Court of Indian Fishing Offenses. Except as may be otherwise provided by tribal regulations approved by or on behalf of the Secretary of the Interior, any person claiming to be exercising such tribal right and fishing in violation of the regulations contained in or issued under this Part 256 may be punished by a fine of not to exceed \$500, imprisonment of not to exceed 6 months, or both, and shall have his tribal fishing privileges suspended for not less than 5 days for any violation of this Part 256 or of any area regulation issued pursuant thereto. The court shall impound the fishing rights identification card of any person for the period which the fishing privileges are suspended.

§ 256.7 Savings provisions.

Nothing in this Part 256 shall be deemed to:

(a) Prohibit or restrict any persons from engaging in any fishing activity in any manner which is permitted under state law;

(b) Deprive any Indian tribe, band, or group of any right which may be secured it by any treaty or other law of the United States;

(c) Permit any Indian to exercise any tribal fishing right in any manner prohibited by any ordinance or regulation of his tribe;

(d) Enlarge the right, privilege, or immunity of any person to engage in any fishing activity beyond that granted or reserved by treaty with the United States;

(e) Exempt any person or any fishing gear, equipment, boat, vehicle, fish or fish products, or other property from the requirements of any law or regulation pertaining to safety, obstruction of navigable waters, national defense, security of public property, pollution, health and sanitation, or registration of boats or vehicles;

(f) Abrogate or modify the effect of any agreement affecting fishing practices entered into between any Indian tribe and the United States or any State or agency of either.

[F.R. Doc. 67-8158; Filed, July 14, 1967; 8:45 a.m.]

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON, *et al.,*

Respondents.

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON*

**MOTION OF THE NATIONAL CONGRESS OF AMERICAN
INDIANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE**

Comes now the National Congress of American Indians (NCAI), pursuant to Rule 42, and respectfully moves for leave to file a brief amicus curiae in support of the petitioner herein.

NCAI is a nonprofit association of 87 American Indian tribes. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954, and its

national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

The instant case involves the question of off-reservation Indian treaty hunting and fishing rights, something which is vitally important to Indians and Indian tribes, including NCAI's members. NCAI believes that its factual and legal analysis, taken from the standpoint of an association representing almost all of the major tribes of the United States, will add significantly to the presentation of the petitioner, which has the standpoint of only one tribe and only its own factual situation.

Respectfully submitted,

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Counsel for NCAI

IN THE
Supreme Court of the United States

October Term 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

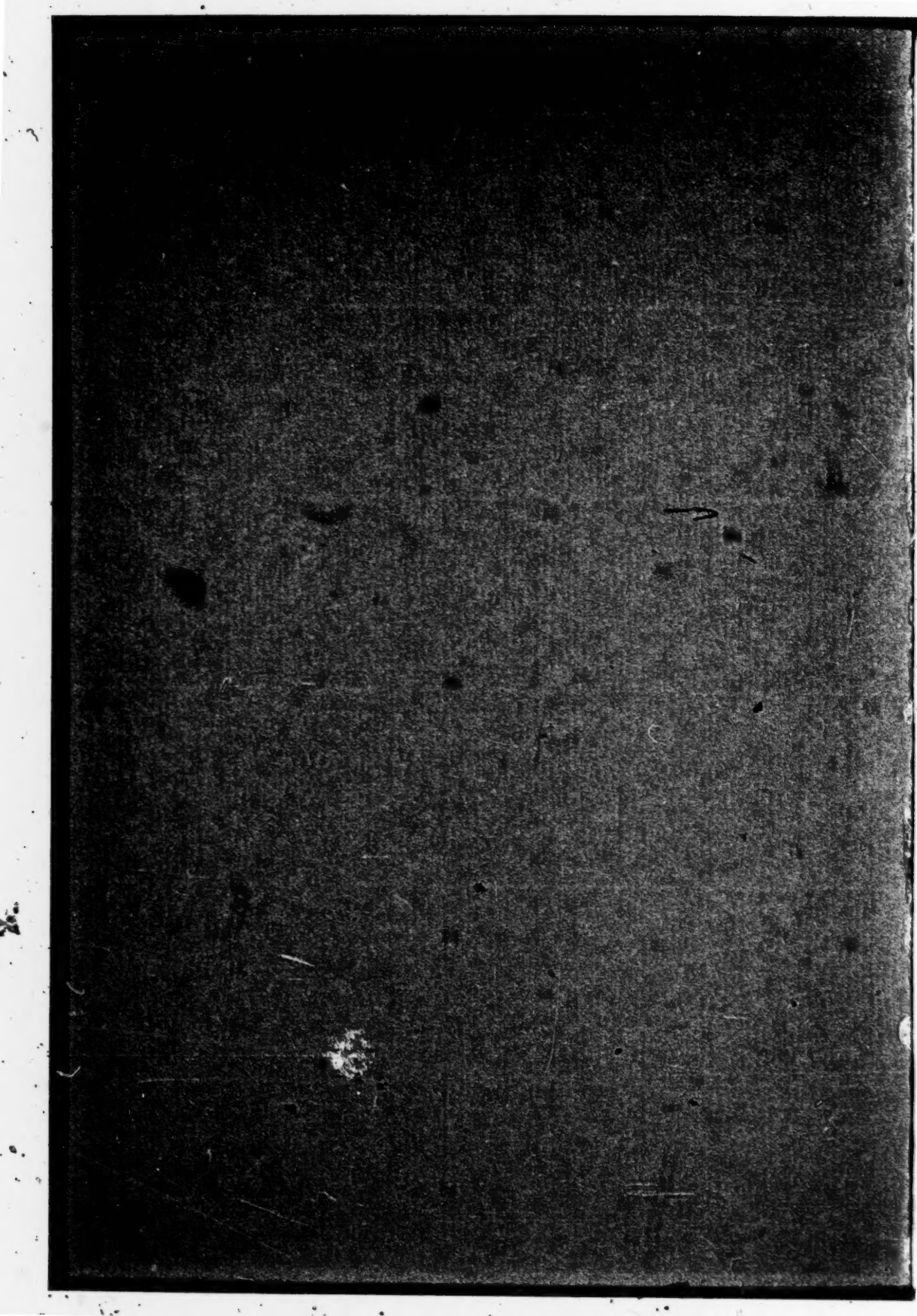
v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington
BRIEF FOR THE PETITIONER

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lands that were alienated by the allottees did not convey fishing rights as these were tribal rights not invidually owned by the allottees (A. 193).

The tribal fishing right reserved to the Indians was the right to catch fish by nets or otherwise in Gommencement Bay and the Puyallup River, the usual and accustomed grounds and stations. Hook and line type fishing was never employed as the catching of fish by this method is extremely inefficient from the standpoint of a people dependent upon fish for their livelihood.

The fish to which the exercise of the tribal fishing right reserved to the Indians by the Treaty applies are salmon and steelhead. These anadromous fish hatch in the fresh water of the Puyallup River, migrate downstream to the salt water of Puget Sound and then on to the Pacific Ocean where they grow to maturity, and then return to the stream where they were hatched to spawn their young by laying and fertilizing eggs in gravel beds. To maintain continuous runs of fish to the river so that runs of fish would not eventually be reduced due to insufficient breeding stock and at the same time not overstock the river it is necessary that a certain number of fish be allowed to escape and return to spawn. After spawning the adult salmon die, the steelhead do not. A return of at least 1% of the adult fish is necessary to assure sufficient spawning by natural means to preserve and assure continuous runs (A. 177).

Two basic factors have caused a decline in the number of fish necessary for natural spawning of fish in the River and a decline in the number of fish which survive after spawning to migrate to salt water. These are: (1) the

changed condition of the River's spawning grounds; and
(2) the increased commercial and sports fishery.

(1) *The Condition of the River's Spawning Grounds.*

At the time of the treaty the Puyallup River flowed peacefully into Commencement Bay; there were no dams on the river, no factories, no lumber mills, no logging operations, no commercial and industrial developments, no municipal sewage—nothing such as exists today. This clear, clean and unobstructed virgin River has been completely changed by the encroachment of the non-Indian civilization. The channel of the River was altered artificially and straightened; Mud Mountain Dam was erected on White River, a major river that flows into the Puyallup; gravel was removed from the spawning beds; logging exposed spawning areas to excessive sunshine, and mud and silt due to the resulting erosion from the denuded hill areas buried gravel beds necessary for spawning; large quantities of water were taken from the River and its tributaries for irrigation, hydroelectric power and industry; and the purity of the water has been befouled by the large quantities of waste material dumped into the River and its tributaries from municipal sewer outlets and industrial waste. A graphic illustration of the disastrous effect of modern civilization upon rivers as natural fish spawning areas is indicated by the sketch set forth in respondent department of fisheries publication, 73rd Annual Report for 1963, Page 48 and 49 (A. 200). These changes have adversely affected the spawning areas and have caused a substantial mortality in the number of fingerlings that are hatched.

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IN THE
Supreme Court of the United States

October Term 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington
BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum decision of the trial court is unreported and is printed on pages 11 to 30 of the Appendix. The opinion of the Washington State Supreme Court is printed on pages 39 to 68, of the Appendix, and is reported in 70 W.D.2d, p. 241 (1967). The remittitur by the Washington State Supreme Court to the Pierce County Superior Court is printed on page 68 of the Appendix. The Pierce County Superior Court, in its ministerial functions in compliance with the remittitur, entered the amended injunction which is unreported and is printed on page 69 of the Appendix.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on January 12, 1967 (A. 39), and became a final judgment of said court on March 13, 1967 (A. 68). The remittitur issued March 15, 1967 (A. 68). The Pierce County Superior Court in its ministerial function entered the final order (amended injunction) pursuant to the direction of the Washington State Supreme Court on June 2, 1967 (A. 69). The Petition for Writ of Certiorari was filed on June 12, 1967, and was granted December 18, 1967. The jurisdiction of the court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Can the State of Washington by the exercise of the police power regulate rights reserved by Indians in treaties with the United States? If such power exists, what, if any, are the limitations of the State's power to regulate?

2. Do the courts of the State of Washington have jurisdiction to:

(a) hear an action against an Indian Tribe without the consent of the Tribe or the United States Government?

(b) determine that an Indian reservation does not exist where such reservation was established by treaty and never terminated by Congress?

(c) determine the extent of the rights, privileges or immunities of an Indian's or Indian Tribe's Treaty with the United States Government with respect to fishing and further to affirmatively limit such rights, privileges, or immunities to the same extent that all other citizens are limited.

3. Is the use of an injunction constitutionally valid to prohibit future criminal actions by an organization and its members and particularly where all of the members are not before the court? Is the use of the injunction justified under the circumstances of this case?

THE TREATY AND STATUTES INVOLVED

The Treaty involved is that certain treaty known as the "Treaty of Medicine Creek." It is published in 10 Stat. at p. 1132, (A. 69).

STATEMENT OF THE CASE

1. Pleadings and Prior Proceedings

The State of Washington in its complaint alleged that the Puyallup Tribe claimed special privileges and immunities from the application of state conservation laws and regulations to which it was not lawfully entitled. It asked the court to declare these claimed privileges and immunities void, and asked that the Tribe be permanently enjoined from destroying the fish runs in the Puyallup River (A. 5). The Tribe answered by denying the court had any jurisdiction over the persons or subject matter of the action and asserted that it was exercising its rights under the Medicine Creek Treaty of 1854 (A. 8).

The trial court, after trial, found that the Puyallup Indian Tribe did not exist, that the Puyallup Indian Reservation did not exist and that the state laws and regulations were reasonable and necessary to preserve the

fishery (A. 30). The trial court then issued an injunction prohibiting the Tribe from fishing in Commencement Bay and the Puyallup River contrary to the laws and regulations of the State of Washington (A. 37).

The Supreme Court of the State of Washington affirmed the trial court in all respects, except it ruled that the court had no jurisdiction to determine the non-existence of the Puyallup Tribe and that the injunction was too broad. The State Supreme Court ordered the trial court to limit its injunction to those regulations that were reasonable and necessary to the preservation of the fishery (A. 39). The trial court, in its ministerial function, subsequently modified its injunction pursuant to the State Supreme Court's direction and prohibited net fishing by the Tribe (A. 69).

2. Statement of Facts

On December 26, 1854, at the request of the United States government, the Puyallup Indian Tribe and the United States government entered into the Medicine Creek Treaty (10 Stat. 1132) (A. 69).

Under Article I of this Treaty, the Puyallup Indian Tribe ceded and relinquished to the United States government all its right, title and interest to thousands of acres of land. In Article II of the Treaty, the Puyallup Indian Tribe reserved as a reservation a tract of land located in the Puyallup River Valley. The essence of this Treaty was that in consideration of the Puyallup Indian Tribe ceasing hostilities and relinquishing its vast land holdings, the United States government reserved to it the exclusive possession and use of the Puyallup Indian

Reservation and further the right to fish at all usual and accustomed grounds and stations outside the reservation. This right to fish at the usual and accustomed grounds and stations and within the boundaries of the Reservation was a vital and essential part of the Treaty (A. 183) and was carried out by the use of nets, weirs and traps (A. 182).

Immediately after the signing of the Medicine Creek Treaty, the Puyallup Indians ran into difficulty exercising their treaty fishing right due to an improper survey by the United States government which had removed from the reservation the frontage on Commencement Bay. A strong protest was made by A. H. Milroy, Superintendent of Indian Affairs, Washington Territory to Hon. Comm., Indian Affairs, Washington, D.C., letter dated March 20, 1873 (A. 193). In response to this letter which set forth the importance of the fishery to the welfare and existence of the Puyallup Indians, President Grant signed an executive order on September 6, 1873 which confirmed the reservation to the Puyallup Indian Tribe of one mile of water frontage on Commencement Bay and the entire mouth of the Puyallup River (A. 77).

In 1887 the General Allotment Act was passed (24 Stat. 388). The Puyallup Indian Tribe acting thereunder set aside to the members of the tribe certain tracts of land in the form of allotted land. Subsequent federal laws were enacted authorizing the allottees to alienate these lands. Large portions of these allotted lands were never alienated and are presently owned by the Indian children and grandchildren of the original allottees. The deed for

(2) *The Increased Commercial and Sports Fishery.*

The salmon and steelhead runs to the Puyallup River as to other rivers of the State of Washington are subjected to an immense non-Indian commercial and sports fishery, the intensity of which could not be imagined at Treaty time. Both the increase in the number of fishermen and the increase in the number of boats and the efficiency of the equipment employed by both salmon and steelhead fishermen have contributed to a decrease in the number of fish which return to spawn.

That the total Indian fishery throughout the State of Washington does not contribute in any substantial manner to this decrease is indicated by the statistics of the respondent department of fisheries published in 1963 in its 73rd Annual Report, page 127 (A. 201), which states as to the pink salmon run that the Indian fishery accounted for only 8.7% of the total catch in Puget Sound. This percentage figure does not take into account the total commercial catch in all areas and the nearly half-million pink salmon taken in 1963 by sports fishermen. Other statistics in this same publication prepared by respondent department of fisheries indicates that the total Indian fishery for other species of salmon do not exceed this percentage figure which shows that over 90% of these fish are netted by non-Indian fishermen.

At the time this action was commenced in the trial court, the total Puyallup Indian catch of steelhead and salmon amounted to only about 3% to 5% of the total fish catch from the Puyallup River anadromous fish runs (A. 28).

The Puyallup Indian tribe fished openly with nets and other ancient tribal methods without interference until the 1920's. In the 1920's, the State of Washington embarked upon a policy of prohibiting Indian fisheries not only within the exterior boundaries of the Puyallup Indian Reservation, but also as to their usual and accustomed fishing grounds (A. 189, 190). As a result the Indians commenced fishing at night to avoid interference by the State with the exercise of their treaty rights. In 1953 the Puyallup Indian Tribe openly challenged the state's right to prohibit fishing at which time Robert Satiacum was arrested for violating the fishing rules of the respondent department of fisheries. This criminal action resulted in a dismissal in the court below and the State appealed. In the case of *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957), a divided court affirmed the dismissal and thereafter the Puyallup Indians exercised their Treaty fishing rights on the Puyallup River and at their usual and accustomed fishing grounds without state harassment. The State of Washington thereafter spent considerable effort preparing another case against the Indians. This time the action was brought in the form of a civil action enjoining the Puyallup Indian Tribe and Robert Satiacum from doing any net fishing in the Puyallup River or Commencement Bay. The state was granted an immediate injunction based on affidavits that were submitted to the Court, which complaint, injunction and affidavit were then served upon the Puyallup Indian Council and Robert Satiacum. The injunction was granted on the 12th day of November, 1963 (A. 7, 8). The injunction completely prohibited any Puyallup Indian from fishing in the Puyallup River and Commencement Bay. In February of 1966, a

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three-week trial was had which was concluded with the trial court entering a permanent injunction enjoining the Puyallup Indians from fishing with nets in the Puyallup River and Commencement Bay, which in effect has enjoined any type of Indian fisheries within the exterior boundaries of the Puyallup Reservation and their usual and accustomed fishing grounds. An appeal was taken to the Washington State Supreme Court. While said appeal was pending, Robert Satiacum, the defendant who had been acquitted by the Washington Supreme Court in the prior decision of *State v. Satiacum*, was found guilty of contempt of court and was punished by imprisonment for 60-days in the Pierce County Jail.

The State Supreme Court held the injunction was too broad and ordered the trial court to limit its injunction to those regulations which were reasonable and necessary for the preservation of the fishery. The trial court thereupon entered its order in accordance therewith permanently and totally enjoining any Puyallup Indian from exercising the tribal fishing right in any manner within the exterior boundaries of the Reservation and at all usual and accustomed grounds and stations located at Commencement Bay and the Puyallup River.

SUMMARY OF ARGUMENT

- I. The Restrictions Imposed by the Court Below Upon the Exercise of the Treaty Reserved Fishing Rights of the Puyallup Indian Tribe Are Invalid as They Are Beyond a State's Power to Regulate.
 - A. *Validity of the State's Restriction of the Exercise of the Treaty Fishing Right at "Usual and Accustomed Grounds and Stations."*

The Indian petitioners have rights reserved to them by a Treaty with the United States to catch fish by netting for them according to immemorial tribal custom in Commencement Bay and the Puyallup River, their "usual and accustomed grounds and stations." The Indians have been exercising these rights at these places for over One Hundred (100) years.

Through commendable self-imposed restraint they have never abused these rights and were taking only about three to five percent (3% to 5%) of the total catch of the anadromous fish runs of the Puyallup River at the time they were permanently and totally enjoined from netting fish at their usual and accustomed grounds and stations. The non-Indian State of Washington "regulated" commercial and sports fishery are responsible for the remaining ninety-five to ninety-seven per cent (95% to 97%) of the total catch of fish from the River. These figures are not in dispute as they were so found by the trial court which heard all of the evidence and stated on Page 22 of its Memorandum Opinion (A. 28).

"The evidence indicates, however, that the Indian catch of salmon and steelhead is only about three to five percent (3% to 5%) of the total."

Despite the small percentage of fish being netted by

the Indians, the respondent departments promulgated regulations completely prohibiting the Indians from netting fish.

The Court below held that the regulations of the respondents departments which completely prohibit the Indian petitioners from netting *any* fish at their usual and accustomed grounds and stations met the test of validity because they were "reasonable and necessary for the conservation of the fishery" (A. 39). In manufacturing its "reasonable and necessary for the conservation of the fishery" test the Court below also rejected the "indispensable" test laid down in *Maison v. Confederated Tribes of Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963) as "completely unworkable."

The factual pattern of the instant case fully illustrates why the "reasonable and necessary test" manufactured by the Court below is invalid, totally unworkable and without legal precedence. The factual pattern against which this "test" has been cast is as follows: The respondent departments' regulations in effect divide the total fish runs from the Puyallup River into two (2) groups. The ninety-nine percent (99%) "nettable" group and the one percent (1%) "non-nettable" group or brood-stock group which must be allowed to go back up the River to spawn if the fish runs are to be maintained. The only fish the regulations allow to be caught by nets are in this ninety-nine percent (99%) group and all netting for them must occur outside the entrance to Commencement Bay which is outside the exterior boundary of the "usual and accustomed grounds and stations" where the Indians have a treaty right to net fish (A. 176, 177). The only fish from

this ninety-nine percent (99%) "nettable" group which are allowed to remain alive to enter this area are the quota figured to be taken by sports fishermen. As the only fish left after the commercial netting and sports fishing are taken care of is the one percent (1%) non-nettable "brood-stock," the fish allowed to be caught by the Indian petitioners in the exercise of their Treaty rights are non-existent.

Petitioners contend that the "reasonable and necessary to the conservation of the fishery" test of the court below allows the respondent departments to manipulate the taking of fish so that all the fish that can be taken without endangering "brood-stock" are taken by non-Indian commercial and sports fishermen. The states own witness, Dr. Hamilton testified that who took the fish or where they were taken was a social or political affair (A. 178). Thus, each court using this test would be compelled, as the Court below apparently was, to hold that as the only fish left are brood-stock, the regulations prohibiting the Indians from netting them are "reasonable and necessary to the conservation of the fishery" and are thus valid. This is what happened in the instant case even though the Indian fish catch amounted to only about three percent to five percent (3% to 5%) of the total catch.

The "indispensable" to the conservation of the fishery test set forth in *Maison v. Confederated Tribes of the Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963) (A. 201) is not susceptible to this administrative manipulation. Under this test, the respondent departments would be required to allow for a sharing of the fish by reducing the catch of the non-Indian commercial and sports fishermen by about three percent to five percent (3% to 5%)

margin, which is about the percentage of the total catch taken by the Indian petitioners.

The Indian petitioners submit that the adoption by this Court of the "indispensable" test of *Maison v. Confederate Tribes of the Umatilla Reservation* or a similar test or standard would allow for the exercise of the fishing rights reserved to them by a solemn Treaty with the United States with only a small reduction in the ninety-five to ninety-seven percent (95% to 97%) of the catch being netted and caught by non-Indian commercial and sports fishermen.

B. Validity of the State Restriction of the Exercise of Treaty Fishing Rights Within the Exterior Boundaries of the Reservation.

The exercise of the Treaty fishing rights of the Indian petitioners within the exterior boundaries of the original Puyallup Indian Reservation is not subject to any restriction by State regulations. *United States v. Winans*, 198 U.S. 371 (1905); *Moore v. United States*, 157 Fed. 2d, 760 (9th Cir. 1946).

The Court below in order to impose State regulations declared that the Puyallup Indian Reservation was abolished and the Indian petitioners had no Treaty fishing rights to fish thereon because it was once a reservation.

This Court has continuously held that only the Congress has the power to abolish or constrict the boundaries of an Indian reservation, *United States v. Celestine*, 215 U.S. 278 (1909); *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962). Allotment of land in severalty pursuant to allotment acts does not abolish the reservation or change its boundaries. *United States v. Pelican*, 232 U.S. 442 (1914). The extinguishment of Indian rights is not

to be implied but must be expressly declared by acts of Congress. *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941). The Indian petitioners contend that unless and until the Congress expressly enacts an act such as a Termination Act abolishing or constricting the boundaries of the original Puyallup Indian Reservation, the original boundaries of that reservation mark the area within which the communal fishing rights reserved to the tribe by federal Treaty may be exercised without State restriction.

II. A State Court Has No Power or Jurisdiction to Abrogate a Term of a Federal Treaty by Removing Rights, Privileges or Immunities Reserved Therein to an Indian Tribe

The supremacy clause provides in part that all treaties made under authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby. Article VI, United States Constitution. The Indian petitioners were reserved the right of taking fish at all usual and accustomed grounds and stations by Article 3 of the Treaty of Medicine Creek. This provision of the Treaty has been continually construed as reserving to the Indians their ancient right to net fish in accordance with their immemorial customs, which right is superior to that enjoyed by others. *Tulee v. Washington*, 315 U.S. 681 (1942).

The regulations of the respondent state departments upheld by the Court below provide in effect that petitioners cannot catch fish at their usual and accustomed grounds and stations except in the same manner as non-Indians. As the Puyallup Indians are guaranteed the same fishing rights as all others under Amendment 14 of the United States Constitution, the ruling of the Court below

has nullified and rendered meaningless Article 3 of the Treaty of Medicine Creek which reserved to the Puyallup Indians their right to net fish in the tribal manner in these areas.

III: The Court Below Was Without Jurisdiction to Decide This Case and Its Holding Is Invalid

Without the consent of the Indian Tribe or the consent of the United States government, the Tribe cannot be sued in a State Court. *Turner v. United States*, 248 U.S. 364 (1919); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957).

IV. The Injunctive Order Issued Pursuant to the Holding of the Court Below Is Invalid As It Denies to Petitioners the Equal Protection of the Laws Guaranteed to Them by Amendment XIV, Section 1 of the United States Constitution

The State of Washington makes no provision in its game and fisheries laws for enjoining violations by non-Indians. Thus every non-Indian is afforded basic legal and procedural safeguards, including the presumption of innocence whenever accused of violation of State game and fisheries laws or regulations promulgated pursuant thereto. The State tried previously to prosecute the Indian petitioners for alleged violations but was unsuccessful because the burden of proof was unbearable. By bringing an injunctive action, the respondent departments were able to shift this burden to the accused and thereby deprive them of their constitutional safeguards as accused persons. The only situations in which courts will allow the use of an injunction against criminal violations is to enjoin acts which might result in probable immediate and irreparable damage to public property. As petitioners

were only taking three to five percent (3% to 5%) of the total catch and had been doing so for over one hundred (100) years there is no showing of any such immediacy or damage in the record of the instant case. The Indian petitioners contend they are entitled to the same protective Constitutional safeguards as non-Indians.

ARGUMENT

- I. **The Restrictions Imposed by the Washington State Supreme Court Upon the Exercise of the Treaty Reserved Fishing Rights of the Puyallup Indian Tribe Are Invalid as They Are Beyond the Limitations of the State's Power to Regulate**

Background of the Treaty Fishing Right.

The Indian petitioners are successors in interest to the signers of the Treaty of Medicine Creek of 1854, 10 Stat. 1132.

Under the terms of the Treaty, the Puyallup Indians gave up and extinguished their Indian title to vast real estate holdings to the federal government in exchange for a small land reservation and certain reserved tribal communal fishing rights which were not attached to the land but were exercisable within the reservation and that area in which "the usual and accustomed grounds and stations" were situated. The reservation was enlarged later by Executive orders of January 20, 1857, and September 6, 1873. Article III of that Treaty reserved to the Indians their vested fishing rights as follows:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the territory.
..."

The meaning attached to these words must receive a

construction which is most favorable and liberal towards the Indian signators and are to be further construed in the sense that the Indians would understand them as the Indians were a dependent people and accepted the terms without discriminating scrutiny. *U.S. v. Shoshone Tribe of Indians of Wind River, Wyoming*, 304 U.S. 111 (1937); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Nielsen v. Johnson*, 279 U.S. 47 (1928).

Construing the terms in a favorable and liberal manner towards the Indians and in a sense that the Indians would have understood them, these constructions may be indulged in:

(1) The right of taking fish in accordance with tribal custom was absolutely secured;

(2) This right of taking fish was secured without restriction forever as nowhere in the Treaty is there any provision that the right was subject to being taken away upon the occurrence of future events;

(3). This vested right of taking fish was not only secured to fishing within the boundaries of the reservation surveyed and staked out, but also at all usual and accustomed grounds and stations outside the exterior original boundaries of the reservation.

The opinions of this Court have uniformly construed words identical to those appearing in Article III as meaning these words reserved to the Indians the right to fish in accordance with their immemorial tribal customs at their usual and accustomed places, which right was beyond those which other citizens may enjoy. The following quote from *Tulee v. Washington*, 315 U.S. 681 (1942), logically sets forth the meaning of this phrase:

"In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1038, 25 S.Ct. 662, this court held that despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded areas; and in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L.Ed. 555, 39 S.Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognized the full obligation of this nation to protect the interest of a dependent people."

This right to fish unrestricted at usual and accustomed grounds and stations is a communal tribal property right vested in the tribe; it was a tribal property right not subject to individual alienation. *Mason v. Sams*, 5 F.2d 255 (1925); *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl.) 1961. It is an ancient right reserved by the Indians out of those lands ceded to the United States, and was not a grant of anything to them. *United States v. Winans*, 198 U.S. 371 (1905). It was a right reserved under contemplation of sale of the ceded lands and imposed upon those lands a servitude as though described therein. *United States v. Winans, supra*; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1954).

The customary tribal fishing right being carried out by the Puyallup Indians at the time the Treaty of Medicine Creek was entered into in 1854 constituted the following:

(1) Manner of fishing: Dr. Herbert Taylor, the respondent departments' expert witness, testified that the Puyallups fished with weirs and traps (A. 182), spears (A. 182) and nets (A. 182); and normally fished at night (A. 182);

(2) Commerce: Dr. Taylor testified that the fish and clams were not only used for personal consumption but were also traded to obtain necessary commodities and constituted part of the trade with the Hudson's Bay Company (A. 184, 185);

(3) Geographical area: The fishing right was carried on, according to Dr. Taylor, not only within the boundaries staked out for the reservation, but also at "accustomed grounds and stations" within and without the reservation. This was understood by both parties when the Treaty was entered into (A. 183-184). This was a necessary and vital provision of the Treaty (A. 183). The geographical area of the "usual and accustomed grounds and stations" was marked by Dr. Taylor and introduced as defendants' Exhibit EE (R.D. Ex. EE). The area according to Dr. Taylor's testimony consisted of not only the Puyallup River drainage but also various areas of Puget Sound, including specifically Commencement Bay (A. 186). The Puyallups knew where their "usual and accustomed grounds" were located and protected them (A. 181).

That the reserved fishing right was a necessary, sub-

stantial and vital part of the Treaty of Medicine Creek was testified to by Dr. Taylor (A. 183). The Puyallups primarily depended upon the sea and the Puyallup River for their livelihood (A. 180, 181). Article 3 of the Treaty of Medicine Creek pointedly sets out the fishing right.

A. The Exercise of the Reserved Treaty Fishing Right at All Usual and Accustomed Grounds and Stations Outside the Exterior Boundaries of the Puyallup Indian Reservation Is Not Subject to Restriction in Any Manner Where There Is No Proof That Such Restriction Is Indispensable for the Conservation of the Fishery.

Of the total catch of fish from the Puyallup River, anadromous fish runs, the catch by the Indian petitioners as the result of self-imposed restraint amounts to only about three to five percent (3% to 5%) of the total catch. All the rest of the catch from these runs, i.e. about ninety-five to ninety seven percent (95% to 97%), is made by the respondent "regulated" non-Indian commercial and sports fishery.

These percentage figures indicating the small portion of the total catch being taken by the Indian petitioners prior to the issuance of the permanent and total injunction against them, is fully supported by the evidence, was so found by the trial court which studied the testimony of witnesses given on direct and cross-examination, charts, diagrams, etc. in nearly three (3) weeks of trial, are admitted to by respondent departments, and at no time have they been controverted by the trial court or the court below in their findings and opinions.

On page 22 of the trial court's Memorandum of Opinion, which the Court below accepted as "a very able and

scholarly document" (A. 28), the trial court found from all the evidence presented that:

"The evidence indicates, however, that the Indian catch of salmon and steelhead is only about three to five percent (3% to 5%) of the total."

Respondents' own statistics (Plaintiff's Ex. No. 32) (R. P. Ex. 32) places the Indian catch at these figures. This was substantiated by the testimony of Clifford J. Millenbach, assistant chief of fish management division (A. 180). It was admitted by Dr. Donaldson, a State witness, that in 1956 the sportsmen caught 18,500 steelhead to the Indian's 1,500 steelhead, and it is to be noted that the sportsmen fish up river from the Indian net fishery (A. 164).

As the Indian petitioners have no funds or resources to make a survey and statistical analysis of the percentage of Puyallup River fish taken by the Indians as opposed to the non-Indian commercial and sports fishery, the petitioners have no alternative except to accept respondent departments' evidence and statistics that the Indians catch only about three to five percent (3% to 5%) of the total catch as being approximately correct.

Although it would appear that the Indian petitioners should be commended for their self-restraint in taking so few fish in the exercise of their reserved Treaty fishing rights, the trial court and the Court below both held that the taking of this small percentage or any percentage of the run by the Indians would result in "nearly complete destruction" of the fish runs in the Puyallup River.

The reason why these able judges could arrive at such strange and (at least to petitioners) inequitable holdings

is rather simple and is best illustrated as follows. The regulations of respondent departments in effect divide the Puyallup River anadromous fish runs into two distinct numerical groups. The ninety-nine percent (99%) group and the one percent (1%) group. The ninety-nine percent (99%) group is the group that may be caught by commercial nets, sportsmen or otherwise killed without endangering the fish runs through having too few fish returning to spawn. The one percent (1%) group is the "brood stock" group or "non-nettable" group and is the number which must be allowed to escape to spawn if the fish runs are to be continued. The respondent departments regulate the non-Indian commercial fishery so that all the netting of fish from this ninety-nine percent (99%) "nettable" group occurs outside the usual and accustomed grounds and stations of petitioners, i.e. Commencement Bay and the Puyallup River where the Indian fishery is located. The only fish from the ninety-nine percent (99%) fish group which are allowed to live to enter this area are the quota figured to be taken by sports fishermen. As the only fish left after the commercial netting and sports fishing are taken care of is the one percent (1%) non-nettable "brood stock" group, the fish allowed to be caught by petitioners without endangering conservation of the fish runs are non-existent.

Thus the somewhat strange holding that the Indian catch of only about three percent to five percent (3% to 5%) of the total catch of the Puyallup fish could result in "nearly complete destruction" of the fish runs. To arrive at its holding under this factual pattern, the Court below constructed a test to be followed in determining whether or not the Indian petitioners can be validly re-

strained and enjoined from exercising their Treaty fishing right to net for fish in the Puyallup River and Commencement Bay. This test appears to be that if the statutes or regulations of the State prohibiting the exercise of such rights are "reasonable and necessary for the preservation of the fishery" then the Indian petitioners can be restrained and enjoined. Coupled with this test is the statement of the court that "the state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift ~~nets~~ and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery."

Indian petitioners submit that this "test" is no test at all. There is simply nothing left to test. The phrase "reasonable and necessary" when applied to test whether or not non-existent fish, i.e. fish other than brood stock and the quota figured to be taken by river sports fishermen, can be taken has no meaning. If the respondent departments regulated the non-Indian commercial netting of these fish or reduced the quota reserved for non-Indian river sports fishermen so that any percentage of the "nettable" fish from the Puyallup River fish runs remained to be netted, then this test might have some utility. Absent any "nettable" fish it has none.

Precedence for the use of the words "reasonable and necessary" in establishing its test as to whether or not the Indian Treaty right could be abolished was found by the Court below in the use of one or the other of these words in *Tulee v. Washington*, 315 U.S. 681 (1942); *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226

(9th Cir. 1951); and *U.S. v. Winans*, 198 U.S. 371 (1905).

Petitioners submit that when these words are read in context with the holdings of the cited cases they lend no support whatsoever to the holding of the court below. At most these cases impart the reasoning that the fish runs are to be shared between those having special Treaty rights and those not having such rights. The words "reasonable and necessary" when used by the Court below mean that by administrative manipulation of the location where fish can be netted, non-Indians can be allowed to take not just ninety-five percent to ninety-seven percent (95% to 97%) of the catch but all of the total catch and Indians having Treaty fishing rights to net fish can be totally and permanently prohibited from taking any fish if the regulations so prohibiting are deemed by a State to be "reasonable and necessary to the conservation of the fishery."

In its opinion, the Court below gave consideration to the so-called "indispensable" test laid down in *Maison v. Confederated Tribes of Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963), but rejected this test as "creating a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming Treaty rights" (A.52).

The meaning given to "indispensable" by the federal court in the *Umatilla* case is quite clear. In the *Umatilla* case as in the instant situation the fisheries conservation experts testified that their conservation regulations were designed to provide fish for commercial and sports fisher-

men, without any regard for the Indian fishery. (See testimony of J. E. Lasater, Assistant Director of the State Department of Fisheries (A. 177) where it is admitted that the Indian fishery is disregarded because from a conservation standpoint the allowable ninety-nine percent (99%) mortality must or should occur prior to the entry of fish into the Indian fishery). We quote from page 173 of the *Umatilla* case.

"In Dr. Rayner's view, 'conservation' is a term which involves a compromise of the competing interest of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that by 'conservation,' the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word 'conservation' in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, 'I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether.'

"(2) Such a statement is not evidence of that 'necessity for conservation' required by the *Tulee* case. *In that case the Supreme Court held that a regulation to be necessary, must be indispensable to the effectiveness of a State conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others.* Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society." (Emphasis supplied)

On Page 174 the Court listed one of the alternative con-

servation measures which must be resorted to before restriction of the Indian fishery becomes "indispensable," we quote:

"But the defendants argue that none of the alternative conservation measures specifically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the Treaty.

"(5, 6) However, the Treaty dealt only with the rights of the plaintiff's ancestors, and did not secure rights to any other groups or class. Therefore, while a restriction of the fishing activities of plaintiffs must be *indispensable*, as required by the Treaty (*Tulee v. Washington, supra*) a restriction of the fishing activities of other citizens of a state is valid if merely reasonable, as required by the Fourteenth Amendment to the United States Constitution. *Thomason v. Dana*, 52 F.2d 759 (D. Ore. 1931), *aff'd* 285 U.S. 529, 52 S.Ct. 409, L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the State possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others."

See also the reasoning of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (1951), that there must be a showing that other alternatives must be first exhausted before the Indian Treaty fishing rights can be restricted, one of which alternatives is evidence that the State has sought cooperative agreements with the Indians as "one of the forms of giving the Indians their treaty rights." The State has made no such attempt in the instant case (A. 177).

The crux of the *Umatilla* case "indispensable" test is that it takes into consideration the non-Indian fishery as well as the Indian Treaty fishery and provides for a sharing of the fishery. The "reasonable and necessary" test of the court below takes into consideration only the Indian fishery, does not as much as even mention the non-Indian fishery which takes so many fish, that only "brood stock" is left for the Indians, and thus provides for no sharing of the fish whatsoever.

To sustain its position that the *Umatilla* case "indispensable" test is "completely unworkable" the Court below insinuates in its opinion that the Indian petitioners were not sharing the returning fish with non-Indian commercial and sports fishermen and were carrying on an irresponsible fishery that is harmful to conservation of the fishery. See page (A. 54) of the opinion of the Court below and footnote on page (A. 49) of the opinion where the Court below states: "5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinion in the *McCoy* case *supra* (citation: 63 Wn.2d 421, 387 P.2d 942 (1963)) and Judge Finley's concurring opinion in *State v. Satiacum*, 50 Wn.2d 535, *et seq.* 314 P.2d 400 *et seq.* (1957)." Note that nowhere in the opinion of the Court below is the finding of the trial court and admission of respondents that the Indians were taking only three percent to five percent (3% to 5%) of the total catch, even as much as mentioned. Nowhere in that opinion is any mention made that the remaining ninety-five percent to ninety-seven percent (95% to 97%) of the total catch was being made by non-Indian fishing. The apparent reason for this is that the "reasonable and neces-

sary" test of the court below does not provide for a sharing of the fish so no statement of comparative percentages was necessary.

The Indian petitioners submit that experts and statisticians in fish management are not available to them and the record replete with exhibits and page after page of testimony of respondents' departments' witnesses should be viewed in the same light that evidence of interested witnesses is so viewed. The worth of this testimony and evidence and the close scrutiny it should be subjected to is best indicated by the comparative statistics proffered to the court below by these same respondents in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963) the case mentioned in the footnote to page (A. 49) of the opinion of the court below as evidencing proof of how adversely the Puyallup Indian fishery affects conservation and the necessity for regulation. On page 427 of the *McCoy* opinion the respondents' proffered evidence as to the Puyallup River was adopted as follows:

"Exhibit No. 14 illustrates graphically what occurs when unrestricted fishing is permitted. It shows the catch record of only a few fish in 1953 and more than 14,000 fish in 1960. While the escapement records show approximately 13,000 fish in 1953 and less than 1,800 fish in 1960."

The court below was not informed in this proffered evidence that what was being compared was the record of escapement in a normally heavy run in 1953 as against one of the poorest runs in history not only in the Puyallup River but all rivers in the State of Washington in 1960. This is indicated by the testimony of respondents' own expert J. E. Lasater, Assistant Director of the State of

Washington Department of Fisheries, given on cross-examination (A. 173-174) as follows:

"Q. Now, this would raise the possibility, would it not, sir, that there was a factor outside the Puyallup watershed itself which contributed to, or caused that decline?

"A. We are confusing brood years here. 1960 *was the very bad year*. 1963 *was the result of a progeny from a very poor over all decline in 1960*. The run is up considerably by brood year 1963 over the parent stock. You see, you are comparing one parent stock with another.

"Q. Well, would the new year, 1960, and the fact that this was an across-board low year, would that raise in your mind the possibility of the existence of a factor outside the Puyallup River watershed itself?

"A. Yes, it does. We had to put in the emergency closure that year to get a sufficient spawning stock on the grounds.

"Q. Well, and the run was very poor that year, wasn't it?

"A. Yes, the run was poor in 1960." (Emphasis supplied)

The petitioners further submit that the majority of the evidence introduced by exhibits and testimony of respondents' own witnesses is susceptible to the same misleading conclusion as the comparison of the year 1953 with 1960 in the *McCoy* case.

Throughout the trial, the Indian petitioners tried again and again to elicit from respondent departments' witnesses whether or not the Puyallup Indian fishery was responsible for more or less than only three to five percent (3% to 5%) of the total harvest of the fish runs as

compared to other fishery groups. These inquiries were met only by evasion. See for example, testimony of J. E. Lasater, Assistant Director of the Department of Fisheries (A. 174-175). On (A. 175) this witness testified the percentage of harvest by commercial and sportsmen as opposed to the Puyallup Indian fishery could be ascertained, but the reason it has not been is that from the respondents' standpoint, conservation regulations as to the Puyallup River fish runs are designed so that a ninety-nine percent (99%) mortality occurs or should occur *prior* to the entry of the fish runs into the Puyallup Indian fishery (A. 176-177). On (A. 176-177):

"Q. Would it be accurate to say that in your regulations, you have not found it necessary to work with any comparison of the proportion of the run which is taken by the Puget Sound commercial fishermen as opposed to Indian net fishery on the Puyallup River?

"A. For that particular river, no.

"Q. And, sir, would I be accurate in saying that this is because you have determined from a conservation standpoint that the ninety-nine percent (99%) mortality must or should occur prior to entry into the Indian fishery?

"A. Yes."

From this witness's testimony, it appears from the respondent departments' standpoint that the Puyallup Indian fishery must be absolutely prohibited to allow the necessary one percent (1%) escapement as the State regulations provide that ninety-nine percent (99%) of the mortality must or should occur prior to their taking any fish. (A. 177). In other words, the Treaty fishing rights of the Puyallup Indians are not to be taken in account as to the harvest of any of these fish. The respondent depart-

ments, however, admit (A. 175-176) that the fishery of non-Indians is taken into account in determining the harvest within the allowable ninety-nine percent (99%) mortality, and that if the sports fishery is two percent (2%) then in order to preserve the runs, then two percent (2%) must be taken from the commercial fishery or other mortality factor (A. 175-176).

If the Puyallup Indian fishery of three percent to five percent (3% to 5%) (the respondents' figures) was completely prohibited, then the commercial and sports fishery would still be designed so that a ninety-nine percent (99%) mortality would occur as this is in accordance with state conservation practices (A. 177).

To substantiate its figures that the Puyallup Indian fishery takes three percent to five percent (3% to 5%) of the total runs and as this is not taken into account in the conservation program of the State the escapement to the spawning ground is inadequate, the respondents introduced numerous diagrams, photographs and testimony of their own interested employees. The worth of these diagrams is evidenced by the testimony of Officer Wayland who admitted the nets drawn on his diagrams represented *all* the nets that were ever seen by him over a period of three to four years and did not represent the nets used at any one time, that they were not drawn to scale (A. 167), are used only on out-going tides (drift nets) (A. 165), that tug boats, logs, and debris take them out and prevent netting of fish (A. 166). The trial court commented that the use of words "sweeping the river clean of fish" by this witness were not supported by the evidence (R.S. 670). George Smallwood,

State game protector, testified the nets never went more than half-way across the river (A. 169) and that the diagrams introduced by respondent departments were distorted. On the bottom (A. 169). "No, sir. According to, looking to the map there, I am trying to be honest as absolutely possible. I never saw a net that would cover half-way across the river, about, or quite half way across the river." Appellants submit that this voluminous evidentiary material introduced by respondents does not alter or controvert the admitted statistics of the state and the finding of the trial court, that the Puyallup Indian fishery does not harvest over three percent to five percent (3% to 5%) of the total fish catch.

As the commercial and sports non-Indian fishery percentage figures as to their harvest of these runs is peculiarly within the knowledge of the respondent departments this percentage can only be deducted from the testimony and evidence submitted by respondents' own witnesses. The Indian petitioners submit that it is beyond their limited funds and resources to hire a man to observe the non-Indian fishery for three to four years as did respondents in so employing Officer Wayland (A. 167), or to have aerial and other expensive photographs taken or diagrams drawn in the most favorable light possible to influence the court's judgment away from the cold statistics.

The Indian petitioners do submit that respondents' own witnesses have painted word pictures of the enormity of the commercial and sports non-Indian fishery percentage of this allowable ninety-nine percent (99%) mortality as against the three percent to five percent (3% to 5%) of the total catch taken by the Indian fishery. Mr. J. E.

Lasater, Assistant Director of the State Department of Fisheries, testified that the Puyallup River runs are first identifiable in the Straits of Juan de Fuca (A. 172-173) and the commercial fishery consisting of hundreds of boats begins its harvest from Discovery Bay continuously area after area down through "poor and better grounds" the length of Puget Sound* to the mouth of Commencement Bay (A. 172).

The effectiveness of the commercial fishing boats attacking this run over and over again is best illustrated by the testimony of Edward Sardanov, Fisheries Patrol Officer, who states that nets are used up to 1,800 feet in length (one-third of a mile) and take up to 2,500 to 3,000 fish in one "set" (A. 167-168). These "sets" are made by 1,800-foot nets all the way to the mouth of Commencement Bay at Brown's Point (A. 168). (R.D. Ex. F).

When these "sets" are multiplied by ~~two or~~ three a day (A. 167-168) by hundreds of boats, the vast actual percentage of the ninety-nine (99%) percent mortality contributed by the commercial fleets is readily apparent. The commercial fishery uses every imaginable type of net and fishing device not even conceivable when the Treaty of Medicine Creek was entered into.

Respondent departments' licensing statutes (R.C.W. 75.28.120, 75.28.240) describe them as set lines, troll lines, gill nets, set nets, dip bag, drag seine, lampara nets, purse seines, otter trawl, reef nets, fyke nets, brush weirs and ring nets. The Indian petitioners submit that the restriction of these efficient devices for only one day would save more fish than the Indians take all season.

To summarize: The exercise of the fishing rights re-

served to the Indian petitioners at usual and accustomed grounds and stations accounts for only three to five percent (3% to 5%) of the total catch of the fish runs in the Puyallup River. An escapement of one percent (1%) to the spawning grounds is necessary to maintain those runs. The respondent departments' regulations are designed for a mortality of ninety-nine percent (99%) of the runs to provide a maximum catch for commercial and sports fishermen, without any provision for consideration of the Indian fishery catch within that ninety-nine (99%) figure. The State cannot restrict the Indian Treaty fishery without showing such restriction is "indispensable" to its conservation regulations. To be "indispensable" other available alternatives must first be resorted to, such as restriction or limitation of the sports and commercial fishery. Such alternatives have not been resorted to and thus the holding of the court below is invalid.

B. The Exercise of the Reserved Treaty Fishing Right Within the Exterior Boundaries of the Original Puyallup Indian Reservation Is Not Subject to Restriction by State Regulations; the Puyallup Indian Reservation Exists and a State Court Has No Jurisdiction to Abolish It.

For the convenience of the court and to avoid repetition, the problem of the "on reservation" Treaty fishing right and the existence of the Puyallup Indian Reservation are discussed under this single heading.

The courts are uniform in stating that enrolled members of an Indian Tribe to whom fishing rights have been reserved by federal Treaty may exercise those rights within their reservation boundaries without restriction by the State laws or regulations. *United States v. Winans*, 198

U.S. 371 (1905); *Moore v. United States*, 157 Fed.2d 760 (9th Cir.) (1946); *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930); Cohen, *Handbook of Federal Indian Law*, pages 285, 286.

The court below held however that the Puyallup Indian Reservation has ceased to exist and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation (A. 54). The reasoning of the court below appears to be that as the major share of the reservation passed into fee simple private ownership pursuant to the federal allotment act even though much of it is still remains in the possession of the original Puyallup Indian allottees, this has caused the reservation to be terminated and the petitioning Puyallup Indians to lose the communal tribal fishing rights reserved to them by the Treaty (A. 47).

The fallacy in this reasoning, petitioners contend, is that the communal tribal fishing rights reserved to the Puyallup Indian Tribe by the Treaty with the United States government has nothing to do with the reservation land itself. The original boundary to the reservation land sets the area within which these tribal rights may be exercised without state restriction. These treaty reserved fishing rights are separate from the land and may be exercised at any time without state restriction unless prohibited or changed by the federal government.

The Indian Petitioners find no quarrel with those cases which have held that Indians committing crimes on allotted lands within the original boundaries of an Indian reservation are subject to state prosecution where federal supervision and jurisdiction is lacking and there exist no

tribal policemen or courts. Such cases involve no Treaty reserved property rights or activities exercisable under an existing federal supervision as in the instant case. The Treaty of Medicine Creek contains no provision reserving to any Puyallup Indian a right to commit murder, robbery or any other felony or crime and to go unpunished. Those cases involve no Treaty right and are distinguishable on that ground. Note, however, that a State has no jurisdiction over tribal Treaty rights even as to crimes committed by Indians on alienated lands within original reservation boundaries where provision has been made in the Treaty or federal statutes for tribal courts and tribal enforcement officers and the federal government exercises an existing jurisdiction and supervision over such matters. See *Seymour v. Warden of Washington State Penitentiary*, 368 U.S. 351 (1961).

The Indian petitioners contend that once the original boundaries of the Puyallup Indian Reservation were surveyed and staked out pursuant to Article II of the Treaty of Medicine Creek and as changed by the Executive orders of January 20, 1857 and September 6, 1873 as recognized as valid and conclusive boundaries in *Ross v. Eells*, 56 Fed. 855 (1893), those surveyed and staked out boundaries set the limits within which certain property rights and activities provided for in the Treaty (including the on-reservation fishing rights) could thereafter be exercised under exclusive federal supervision, and the patent, allotment or alienation of lands pursuant to the federal allotment acts had no effect upon those boundaries as to those rights and activities which do not depend upon actual tribal ownership of land.

This contention finds support in the Treaty of Medicine Creek, in actions by the Congress and in Federal case law.

(1) *Treaty support.*

Article 6 of the Treaty of Medicine Creek provided for the allotment of lands within the reservation to individual members of the Puyallup Tribe. Nowhere in that Treaty is there expressed any intention that acceptance of allotments would be at the expense of loss of the right of exercise of specifically reserved and vital fishing activities within the confines of the original reservation boundaries. Reading such a provision into the Treaty would be directly contrary to the rule of construction that Indian Treaties are to be interpreted in a liberal sense in favor of the Indians. *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 115 (1942); *Nielsen v. Johnson*, 279 U.S. 47, 73 L.Ed. 607 (1928).

(2) *Congressional support.*

The Congress provided in the Enabling Act whereby the territory of Washington was allowed to become a state that "Indian lands shall remain under the absolute jurisdiction and control of the United States". . . when statehood was assumed. 25 Stat. 676.

The term "Indian lands" used in the Washington Enabling Act appears to be analogous to the term "Indian country." The Congress in 62 Stat. 683, 757, 18 U.S.C. 1151 defines "Indian Country" in part as follows:

"Except as otherwise provided in sections 1154 and 1156 (liquor offenses) of this title, the term 'Indian Country,' as used in this chapter, means (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent; and, includ-*

ing rights-of-way running through the reservation.
" (Emphasis supplied)

Thus it would appear that the State of Washington by agreement in the Enabling Act for that state, disclaimed all jurisdiction and control over Indian lands within the territory of Washington and is therefore precluded from assuming any jurisdiction or control over the exercise of Treaty reserved fishing rights within the confines of the original Puyallup reservation boundaries, which the Congress has concluded in its definition of "Indian Country" as being unaffected by the issuance of fee patents.

Nowhere in the enactment of Congress of the Puyallup Allotment Act of 1893 (27 Stat. 633) or the Cushman Act of 1904 (33 Stat. 565) is there any expression that the acceptance of allotments would be at the expense of loss of the right to exercise Treaty reserved property rights and activities within the confines of the original reservation boundaries. Statutes terminating Indian rights are to be narrowly construed. *United States ex rel. Shoshone Indian Tribe v. Seaton*, 248 F.2d 154 (1957).

The Congress has expressly recognized the existence of the Puyallup Reservation and that the boundaries have not been constricted by the issuance of fee patents. See Report with respect to the House Resolution of the Committee on Interior and Insular Affairs to conduct an investigation of the Bureau of Indian Affairs, House Report No. 2503 82nd Cong., 2nd Sess. (Govt. Printing Office, 1953) which states on page 933 in referring to the Puyallup Reservation, Washington as follows:

"The original area was 18,061 acres. In 1950 the area consisted of 33 acres of tribal land and 17,867 acres patented in fee."

Whenever the Congress has deemed it necessary to constrict the boundaries of an Indian reservation or abolish the reservation it has uniformly done so by enactment of Termination Acts (See 25 U.S.C., Chapter 14). Allotment acts are not used for this purpose for the reason that they are enacted for an entirely different purpose. In the Termination Acts specific and detailed provisions are made for division of tribal property, rights and assets, termination of federal programs, determination of rights of descent and distribution, and the protection of minors and disabled persons through appointment of guardians or representatives for them.

(3) *Federal case support.*

The United States Supreme Court has continuously held that only the Congress has the power to abolish or constrict the boundaries of an Indian reservation. *United States v. Celestine*, 215 U.S. 278 (1909); *Board of Commissioners v. Seber*, 318 U.S. 705 (1943); *Seymour v. Superintendent*, 368 U.S. 331, 359 (1962). The underlying reasoning of the courts in placing the question of termination of an Indian reservation or change in reservation boundaries with the Congress and executive branch of the federal government is not only because the whole subject of dealing with the affairs of Indians was committed to the federal government by Article I, Section 8, Clause 3 and Article II, Section 2, Clause 2 of the United States Constitution (See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) 5 Pet. 1, *Worcester v. Georgia*, 6 Pet. 515 (1832); holding reaffirmed in *Colliflower v. Garland*, 342 F.2d 369 (1965), but also is based upon the need for *uniformity of recognition* by state governments as well as the

branches and agencies of the federal government to avoid conflicts and inconsistencies and to promote an orderly transfer of jurisdiction over reservation lands and tribal property rights exercisable within the original boundaries of such reservations.

The United States Supreme Court has held that the allotment of land in severalty within the original boundaries of a reservation does not change the reservation. *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Celestine*, 215 U.S. 278 (1909); *United States v. Sutton*, 215 U.S. 291 (1909). See also *Guith v. United States*, 230 F.2d 481 (9th Cir. 1956); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946).

The court below on page 249 of its reported opinion (A. 47) cites *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (N.D. Ind. 1940), as authority that a federal allotment act does away with the Indian reservation or constricts its boundaries in such a way as to eliminate the reserved tribal communal fishing rights. This cited district court case involved several treaties, none of which employed language such as that used in the Treaty of Medicine Creek which expressly and pointedly reserved to the Indians their fishing rights. Also the judge in the *Marks* case pointed out on page 427 that the Department of the Interior had made the necessary federal level political decision disclaiming any further responsibility for the tribe. Petitioners fail to understand the citation of *Pennock v. Commissioners*, 103 U.S. 44 (1881) and *Spalding v. Chandler*, 160 U.S. 394 (1896), by the court below as additional support for this same proposition. The *Pennock* case appears to stand only for a proposition that

restrictions on alienation are removed when the patent of the federal government is issued for Indian-owned land. The *Spalding* case appears to support the position of petitioners that only the federal government has the power to terminate a reservation or constrict its boundaries, as this case holds that the termination of the existence of an Indian reservation, the constriction of its boundaries, or the extinguishment of Indian Treaty rights in connection therewith can only be done by an *express* declaration of the Congress and such declaration cannot be *implied* from an act of Congress setting aside a portion of the Indian reservation as public use land. This case is analogous as to its facts with the instant situation where the court below, the Washington State Supreme Court, held that an Indian reservation can be terminated by implication from a federal act enacted for a different purpose. The *Spalding* case is footnoted in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941) at page 357. The *Santa Fe* case holds that the power of Congress as to extinguishment of Indian title is supreme and exclusive with the Congress. The exercise of this power cannot be implied but must be expressly declared by Congress. On page 354 the court stated:

"But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, 56 L.Ed. 941, 946, 32 S.Ct. 565, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"

The Indian petitioners submit that unless and until the Congress enacts a Termination Act terminating federal supervision over the Puyallup Indian reservation or constricting the boundaries of the original Puyallup Indian reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty of Medicine Creek may be exercised without restriction by state laws or regulations.

II. A State Court Has No Jurisdiction to Determine the Extent of the Rights, Privileges or Immunities of an Indian Tribe's Treaty With Respect to Fishing and Further to Affirmatively Limit Such Rights, Privileges or Immunities to the Same Extent That All Other Citizens Not Having Treaty Rights Are Limited.

The Supremacy Clause provides as it did at the time the Treaty of Medicine Creek was entered into in 1854:

"This Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Emphasis supplied). Article VI, United States Constitution.

Under Article II of the federal Constitution the chief executive was granted the power to make treaties, by and with the advice and consent of the United States Senate. Under Article I of the federal Constitution, the Congress was granted the exclusive power to regulate commerce with the Indians.

Pursuant to such powers the Treaty of Medicine Creek was entered into.

Article III of the Treaty of Medicine Creek reserved to the Puyallup Indians:

"The right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens. . . ."

The holding of the Court below and the injunctive order issued pursuant thereto if allowed to stand will permit the State of Washington to completely erase these words from the Treaty. Prior to Treaty time, and for over a century thereafter the Indian petitioners have netted for fish in the Puyallup River and Commencement Bay (A. 182). These areas are part of their "usual and accustomed grounds and stations" (A. 186).

The Indian petitioners submit that the "reasonable and necessary to the conservation of the fishery" test set forth in the opinion of the Court below (A. 54) when applied to "non-nettable" brood-stock fish which are the only fish allowed by respondent departments to enter petitioners' "usual and accustomed grounds and stations" other than the quota figured to be taken by sports fishermen, simply means that the court below has construed this term of the Treaty to mean the petitioners cannot catch fish at their "usual and accustomed grounds and stations" except in the same manner and at the same times as other inhabitants of the state may exercise whatever rights they may have in this regard.

As the Puyallup Indians are guaranteed the same fishing rights under Amendment 14 of the United States Constitution as all others, regardless of their Treaty rights, this construction of the Treaty would render these words meaningless. *Makah Indian Tribe v. Schoettler*, 192 F.2d

224, 226 (9th Cir. 1951). The construction of these words which the court below would require is in direct contradiction to all rules of construction requiring an interpretation of Treaties liberally in favor of the Indian participants thereto. *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); *U.S. v. Shoshone Tribe of Indians of Wind River Wyoming*, 304 U.S. 111 (1937).

The federal courts including the United States Supreme Court have consistently and repeatedly held that the fishing rights reserved to Indians by treaty bestow upon them rights to fish outside the exterior boundaries of their reservations not enjoyed by non-Indian inhabitants. In *United States v. Winans*, 198 U.S. 371, 381, 382 (1905), the lower court decision was to the same effect as that of the lower court in the instant case. The Supreme Court reversed, stating:

"In other words, it was denied (by the court below) that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and gave the word of the nation for more. . . .

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a

reservation of those not granted . . . The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. . . . The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.”

In *Tulee v. Washington*, 315 U.S. 681 (1942), the United States Supreme Court again reaffirmed that Treaty fishing rights of Indians reserved to them greater rights than that enjoyed by non-Indian inhabitants as follows:

“In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1038, 25 S.Ct. 662, this court held that despite the phrase ‘in common with citizens of the territory,’ Article 3 conferred upon the Yakimas *continuing rights, beyond those which other citizens may enjoy*, to fish at their ‘usual and accustomed places’ in the ceded areas; and in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L.Ed. 555, 39 S.Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the

tribal representatives at the council and in a spirit which generously recognized the full obligation of this nation to protect the interest of a dependent people." (Emphasis supplied)

The Congress has determined that the manner, times and area of exercise of Indian Treaty fishing rights at usual and accustomed grounds and stations are rights not enjoyed by other inhabitants as indicated by the appropriations of large sums of money to extinguish those rights. Indians having Treaty fishing rights on ceded lands at Celilo Falls were paid over Twenty-five Million Dollars for those rights when the Dalles Dam was constructed on the Columbia. Non-Indian fishermen have no rights that are subject to compensation. See *United States v. Brookfield Fisheries, Inc.*, 24 F.Supp. 712 (1938), as to Treaty fishing rights at usual and accustomed grounds and stations at Celilo Falls:

"These treaties extended to them the right to fish where they had always fished. An easement was laid down of ingress to and egress from such usual and accustomed places. A fishery in gross was attached to all real property and titles subject to that description. The government was at that time, moreover, the sovereign and proprietor, and grants made then attached to all future conveyances as if written therein."

The power exercised by the state to regulate fishing is a police power derived from that residuum of sovereignty not delegated to the federal government. *Manchester v. Commonwealth of Massachusetts*, 139 U.S. 240 (1891). It follows that the power left to the states when the federal government was granted its delegated powers, is subject to the granted powers of the federal government and the exercise of them.

The sources of the Federal Constitution granted power are derived from the treaty making power of the President, the Supremacy of those treaties when entered into, and the exclusive power of the Congress to regulate commerce with the Indians.

A treaty entered into with an Indian tribe is supreme over the police power of even one of the original states. *Worcester v. Georgia*, 6 Pet. 515 (1832); *United States v. Salamanaca*, 27 F.Supp. 541 (1939). The fact of admission into statehood after a treaty has been made does not effect the supremacy of the treaty. *United States v. Winans*, 198 U. S. 371 (1905).

A treaty between the United States and Indian tribes is the supreme law of the land, and can not be reformed by the courts or treated by them as inoperative; and the power to make, modify, or abrogate is political and with Congress, which can not assign to the courts duties not properly judicial. *Osage Tribe of Indians v. U.S.*, 66 Ct. Cl. 64, certiorari denied 279 U.S. 811 (1928).

It is submitted that the police powers to regulate fishing reserved to the State of Washington are inferior to the federal treaty and the court below was bound to so recognize the supremacy of said treaty and its judgment and the resulting injunctive order abrogating one of the terms of said treaty are invalid.

III. A State Court Does Not Have Jurisdiction to Entertain an Action Against an Indian Tribe Without the Consent of the Tribe or the United States Government.

Without the consent or authorization from Congress, an Indian Tribe cannot be sued in any court. *Turner v.*

United States, 248 U.S. 364 (1919); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957). *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895).

Even a voluntary appearance by an Indian Tribe does not constitute the requisite consent to be sued. In *United States v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940), an Indian Tribe suffered judgment on a counter-claim. Even though there was no objection raised as to jurisdiction, the judgment was held void when later attacked on this ground.

This immunity from suit is not destroyed by the acceptance of allotments, acquisition of citizenship, or loss of tribal lands. *United States v. United States Fidelity Guaranty Company*, 309 U.S. 506, (1940); *Haile v. Saunooke*, 246 F.2d 293, (4th Cir. 1957).

Various state courts including the State of Washington have recognized this tribal immunity. *State ex rel. Adams*, 57 Wn.2d 181, 356 P.2d 985 (1960); *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961); *State v. Bertrand*, 61 Wn.2d 333, 378 P.2d 427 (1963).

This tribal immunity from suit is applicable to suits in equity as well. *Iron Crow v. Ogallala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

The reserved treaty rights, which the court below has, without jurisdiction, ordered to be taken from the defendant Indian Tribe, is not an individual right but a Tribal communal fishing right. The tribal immunity from being sued cannot be evaded by bringing suit against tribal officers or members in respect to Tribal rights or

property. *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372 (8th Circ. 1895); *Barnes v. United States*, 205 Fed. Supp. 97 (D. Mont. 1962); *Adams v. Murphy*, 165 Fed. 304 (1908). This tribal immunity extends to an action to force compliance with a state statute. *Employment Security Department v. Cheyenne River Sioux Tribe*, 80 S.D. 79, 119 N.W.2d 285 (1963).

The petitioning Puyallup Tribe of the Puyallup Reservation has never been incorporated, did not incorporate under the second branch of the Wheeler-Howard Act (25 U.S.C. 477), and did not adopt a charter thereunder consenting to be sued in any court of competent jurisdiction. The mis-naming of this tribe as a corporation in respondents' complaint does not make it a corporation. By naming the tribal petitioner as "The Puyallup Tribe, Inc." over timely objection of appellants, respondents were apparently attempting to acquire jurisdiction under the reasoning of *Martinez v. Southern Ute Tribe*, Colo. (1962), 374 P.2d 691. The distinguishing difference is that in the *Martinez* case the tribe incorporated and adopted a charter giving its consent to be sued in any court of competent jurisdiction.

It is therefore respectfully submitted that the judgment of the court below and the injunctive order issued pursuant thereto are invalid as the Court lacked jurisdiction to entertain a suit against the Puyallup Tribe and its members to extinguish a Tribal communal fishing right guaranteed by federal Treaty when neither the Tribe, its members, nor the Congress had consented or authorized such a suit. Even though appellants objected several times before and during the trial that the court had no jurisdic-

tion, their failure to do so would not have conferred jurisdiction.

IV. The Holding of the Court Below and the Injunctive Order Permanently Enjoining the Indian Petitioners From Violating State Fisheries Laws and Regulations is not Available to Enjoin Such Violations As to All Citizens and Petitioners Were Denied the Equal Protection of the Laws.

The injunctive order is invalid as equity will not intervene where there is an adequate remedy at law and equitable relief is improper to enjoin the commission of a crime where there is no immediate and irreparable injury to public property. As a result of such issuance, the Indian petitioners were denied equal protection of the laws guaranteed to them by Amendment XIV, Section 1 of the United States Constitution.

The State of Washington failed in *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957) in its criminal prosecution of members of the Puyallup Indian Tribe for violation of state game and food fish statutes and regulations. It failed for the reason that an accused person in a criminal case has certain basic legal and procedural safeguards, not the least of which affords him the presumption of innocence until proven guilty. This presumption casts the burden of proof upon the prosecution to prove its case by a preponderance of the evidence. In *State v. Satiacum*, *supra*, the State of Washington found this burden unbearable.

To avoid the difficulty of carrying its burden of proof and to strip the Indian petitioners of their legal safeguards in a situation where the State has an adequate remedy

at law, i.e. enforcement against violation of its fishing laws and regulations by criminal prosecution, the state was permitted by the court below to bring an injunctive action in equity, which stripped from petitioners their legal safeguards of protection as accused persons and placed upon them the burden of proving their innocence. The State on the other hand was relieved of its burden of proving the guilt of petitioners.

Equity will not intervene by way of injunction where there is an adequate remedy at law and injunctive relief will not issue to stay the commission of a crime. The reason for this rule is succinctly state in *Prosser on Torts* (Hornbook Series 1941 Edition) on page 590 as follows: "As to public nuisance, the remedy by injunction may exist in favor of the state, but its use is somewhat complicated by the *traditional rule that equity will not enjoin a crime as such, where the effect will be to deprive the defendant of his constitutional safeguards*. A private individual may obtain an injunction against a public nuisance only if he can show special damage to himself, distinct from the invasion of the public interest." Cases there cited. (Emphasis supplied)

The exception to the rule that equity will not enjoin a criminal violation where public property rights or interest are affected has no application to the instant case. There is no showing in the record of probable immediate and irreparable damage to public property. The respondents waited nearly a century before bringing an action to dispute the reserved tribal fishing rights of appellants and after failure in that action, *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957), waited for eight

years longer before bringing the instant action. The *sub silentio* conduct of respondents over this span of eight years constituted an admission that there was no immediate danger to or risk of irreparable damages to public property involved.

The trial court on page 22 of its Memorandum Decision found that appellants' exercise of tribal fishing rights amounted to only about three percent to five percent (3% to 5%) of the total catch. It is submitted that there is not only no showing of immediacy or irreparable harm to public property, but that respondent departments' conduct and their own records indicate the contrary to be the case.

The respondent departments have adequate remedies at law as evidenced by the host to foodfish and game fish sanctions set forth in Titles 75 and 77 B.C.W. and the cases they have brought to enforce them as to rights protected by Indian Treaties with the federal government.

Appellants respectfully invite the court's attention to page 703 of *Veterans of Foreign Wars v. Sweeney* (Ohio), 111 N.E. 699 (1916) from which we quote:

"The Constitution and laws of the State have provided the means of protecting the rights of the citizen against his officials by adjudication of them in the courts under formal charge. This is not over-simplifying the situation because the process is simple, thoroughly established as well as protected by time, is fully protective of the rights of free citizens and can well be said to be a part of the genius of democratic functioning."

See also *People v. Fritz*, 316 Ill.App. 217, 45 N.E.2d 48 (1942) and *State ex rel. Department of Public Works v. Skagit River Navigation Co.*, 181 Wash. 642, 45 Pac. 27.

The petitioners have been denied their Constitutional right to equal protection of the laws by the bringing of this unprecedented action against them as nowhere throughout the food fish and game fish laws of this State is provision made for enjoining the future conduct or courses of conduct of non-Indians regarding violations of these statutory regulations. By not so providing, the legislature of the State of Washington did not remove from the protection of its citizens the basic legal, procedural and constitutional safeguards all citizens have when accused of violating a criminal law by allowing courts of equity to issue injunctive orders against a future course of conduct involving fishing laws with enforcement by imprisonment for contempt of court. The Indian appellants are citizens also and are entitled to the same protective safeguards of the laws as non-Indian citizens under Amendment XIV, Section 1 of the United States Constitution. *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1947).

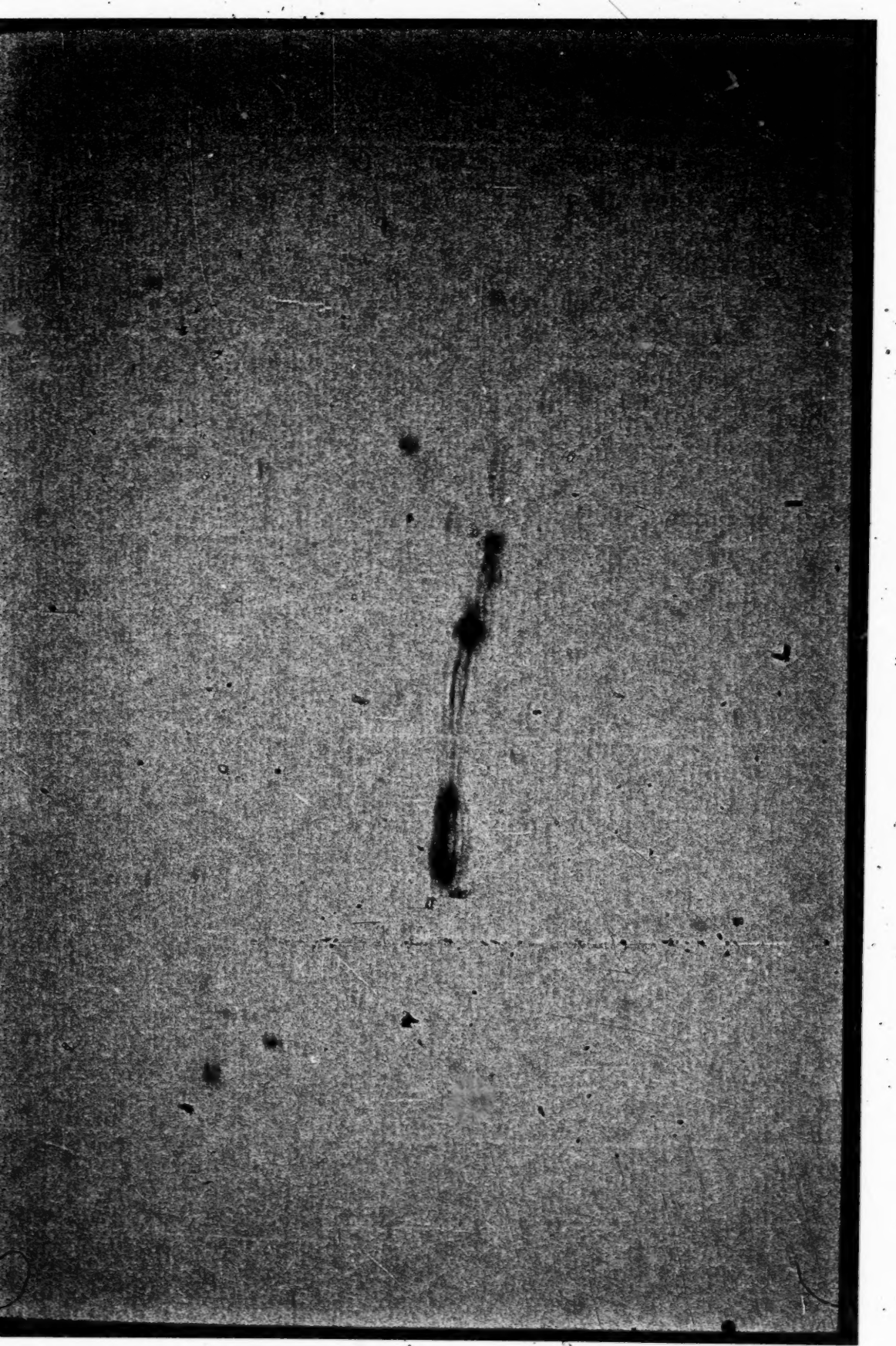
CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed, except the portion thereof ruling that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe.

Respectfully submitted,

ARTHUR KNODEL

Attorney for Petitioner.





In the
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner.

v.

DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON, *et al.*

Respondents.

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON*

**BRIEF OF THE NATIONAL CONGRESS
OF AMERICAN INDIANS, AMICUS CURIAE,
IN SUPPORT OF THE PETITIONER**

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STATEMENT OF INTEREST

The National Congress of American Indians, Inc. (NCAI) is a nonprofit association of 87 Indian tribes. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N. W., Washington, D. C.

NCAI supports the position of the petitioner, the Puyallup Tribe, and joins the petitioner in arguing that the decision

of the Supreme Court of Washington was erroneous, to the extent that it held that the Puyallup Tribe's off-reservation activities are subject to all "reasonable and necessary" state conservation regulations.

NCAI is much concerned with this case because it involves hunting and fishing rights, which are one of the most important issues to Indian tribes today. These rights are under attack in the Northwest states and in Oklahoma, Michigan, Wisconsin,¹ and elsewhere, as the urban areas expand and approach the rural Indian communities, and as the demand increases for the diminishing supply of inland fish and game. The National Congress of American Indians is the organization best qualified to speak for the thinking of the Indians in this country.

ARGUMENT

In 1854, the United States persuaded the Puyallup Indians to cede practically all of their land. The Indians did so, reserving (a) a small amount of land, and (b),

"The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."²

Today their reservation is gone, and they have nothing left except whatever rights are protected by the quoted language.

The Washington Supreme Court held that the Indians are subject to all conservation regulations which are "reasonable and necessary to conserve the fishery."³ This is ambiguous language, and requires some background to see what the court may have meant.⁴

¹The Wisconsin litigation is now before this Court. *Menominee Tribe v. United States*, No. 187, Q.T. 1967, argued Jan. 22, 1968.

²10 Stat. 1132, Art. III.

³422 P.2d at 761.

⁴The following discussion is taken largely from the comprehensive discussion in Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo.Wash. L.Rev. 504, 523-527 (1964).

The Race Horse Case

The first case in this Court on state regulation of Indian treaty hunting and fishing rights outside the reservation was *Ward v. Race Horse*, decided in 1896.⁵ The Bannock Indians ceded land, and the treaty said, "[T]hey shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon"⁶ A Bannock hunted elk on unoccupied land of the United States, one hundred miles off the reservation, in the Indians' former hunting district, within the then new state of Wyoming. This Court held that "unoccupied lands of the United States" did not mean lands within a state which had been admitted into the Union. According to the Court, the terms of the treaty showed that the reserved hunting right was "temporary and precarious," and subject to extinction at any time. This Court held that the admission of Wyoming into the Union on equal footing with the other states had the effect of abrogating the Bannock treaty as far as lands in Wyoming were concerned. The Court felt that the treaty hunting right and the state right to regulate hunting were incompatible.⁷

Despite its broad language, it is clear that *Race Horse* means no more than that off-reservation hunting rights are subject to state regulation. The language to the effect that admission of the state totally wiped out any rights has long since been modified by this Court.⁸

⁵ 163 U.S. 504 (1896).

⁶ *Id.* at 505.

⁷ Congress evidently did not agree with this Court's decision; in 1900 it paid the tribe \$75,000 as damages for the loss of the treaty right as a result of this Court's decision. S.Rept. 69, 56th Cong., 1st Sess. 2 (1900).

⁸ See *United States v. Winans*, 198 U.S. 371 (1905), and *Siefert Bros. Co. v. United States*, 249 U.S. 194 (1919). These cases recognized the survival of such rights as against private interference.

The next case was *New York ex rel. Kennedy v. Becker*.⁹ In 1797, the Seneca Indians ceded land to a private individual by a treaty approved by the United States, and proclaimed by the President. The Indians, however, reserved "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Later, several Seneca Indians were arrested for fishing on the ceded land in violation of state laws. This Court, citing *Race Horse*, said the Indians could fish on the ceded land, but subject to state regulation.

At this point the rule appeared to be that an Indian exercising off-reservation treaty rights was subject to state regulation like other citizens, and the lower courts, mostly in the State of Washington, routinely applied the rule.¹⁰

The Tulee Case

Then in 1942 this Court in the *Tulee* case¹¹ held that Indians owning such rights at least did not have to buy fishing licenses. The Court said that the state could impose on such Indians such restrictions concerning the time and manner of fishing outside the reservation —¹²

"... as are necessary for the conservation of fish."

The Court did not spell out what "necessary" meant. In an extreme sense, almost any fishing restriction could be considered "necessary" for conservation, in that, hypothetically, if the restriction were simultaneously disregarded by a million Indians, the fishery might be destroyed. In a more reasonable sense, however, almost no fishing restriction is

⁹241 U.S. 556 (1916).

¹⁰See *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94 (1927); *State v. Meninock*, 115 Wash. 528, 197 Pac. 641 (1921); *State v. Alexis*, 89 Wash. 492, 154 Pac. 810 (1916); *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805 (1916); *State v. La Barge*, 254 Wis. 449, 291 N.W. 299 (1940); *State v. Morrin*, 136 Wis. 552, 117 N.W. 1006 (1908).

¹¹*Tulee v. Washington*, 315 U.S. 681 (1942).

¹²*Id.* at 684.

"necessary" as applied to Indians, because as a practical fact, their populations are small (there are only about 18,000 Indians in the whole State of Washington), and the small number of fish they take, even when disregarding state restrictions, presents no threat to the fishery. The court below found that the Indians took only 3 to 5 percent of the fish in the stream involved. Only in the case of extreme overfishing (and there may have been a few such cases) would it be "necessary" to apply any restrictions to Indian fishing in order to save a fishery from harm.

The Ninth Circuit Rule

The first case to consider what this Court meant by "necessary" was *Makah Tribe v. Schoettler*.¹³ There the Ninth Circuit struck down a state rule in effect totally prohibiting any fishing in a certain stream, a place where the Indians had treaty rights to fish. The court held that since conservation could be achieved by partial prohibition of fishing, the total prohibition was not "necessary," and hence was not applicable to the Indians.

The same court considered the question again in *Maison v. Confederated Umatilla Tribes*.¹⁴ It laid down the general rule that when the state proposes to restrict Indian fishing, the restriction will be "necessary" and hence valid to apply to Indians only if conservation cannot be accomplished by restriction of non-Indian fishing. In other words, the state must try to achieve conservation first by restricting non-Indians, who have no treaty rights, and only if that would not be sufficient may it restrict the treaty rights of the Indians.

The same court recently reiterated its rule in *Holcomb v. Confederated Umatilla Tribes*.¹⁵

¹³ 192 F.2d 224 (9th Cir. 1951).

¹⁴ 314 F.2d 169 (9th Cir. 1963), cert. den., 375 U.S. 829.

¹⁵ 382 F.2d 1013 (9th Cir. 1967).

The Idaho Rule

In the meantime, in *State v. Arthur*,¹⁶ the Idaho Supreme Court went even further — it held that Indian treaty hunting rights are *wholly* immune from state regulation, and this Court declined to review the case.¹⁷

The Washington Rule

Against this background, the Washington courts in 1954 first faced the issue of what *Tulee* meant, when a Puyallup Indian named Satiacum was arrested for fishing in violation of state fishing regulations. The trial court applied the Ninth Circuit rule and dismissed the prosecution on the ground that the state had not shown that the particular regulations were “necessary” to be applied to the Indians.

The Washington Supreme Court affirmed, but split four to four on the reason for affirmance.¹⁸ Half of the court thought the trial court was right in following the Ninth Circuit rule. The other half went even further and endorsed the Idaho rule to the effect that the state could not regulate the Indians at all.

The local reaction to the *Satiacum* decision was vehement, leading, among other things, to the introduction of resolutions in Congress to overrule the Idaho rule.¹⁹

The Washington court had a chance to reconsider *Satiacum* in the *McCoy* case.²⁰ In that case a Swinomish Indian

¹⁶ 74 Ida. 251, 261 P.2d 135 (1953), *cert. den.*, 347 U.S. 937.

¹⁷ Canada likewise apparently follows a no-regulation-at-all rule. *Regina v. White*, 50 D.L.R.2d 613 (Brit. Col. Ct. App. 1964), *aff'd* 52 D.L.R.2d 481 (Sup. Ct. Can. 1965).

¹⁸ *State v. Satiacum*, 50 Wash. 2d 513, 314 P.2d 400 (1957).

¹⁹ H.R.J. Res. 48, 88th Cong., 1st Sess. (1963); H.R.J. Res. 698, 87th Cong., 2d Sess. (1962).

²⁰ *State v. McCoy*, 63 Wash. 2d 421, 387 P.2d 942 (1963). The *McCoy* case induced a group of Nisqually Indians to defy the *McCoy* rule; they raised an American flag at their off-reservation fishing station and announced a “fish-in.” Marlon Brando joined them. All were

(with the usual "accustomed station" treaty right) fished just outside his reservation with a 600-foot gill net, a rig capable of taking very large numbers of fish. He sold his fish commercial. State regulations had closed the place to fishing temporarily in order to allow the peak of the salmon run to pass upstream to spawn. The state, hoping that the court would apply the Ninth Circuit rule instead of the Idaho rule, offered evidence that unless the closure applied to the Indians, the fishery in that stream (the Skagit River) would be destroyed. The trial court, following the Idaho rule,¹ rejected the evidence on the ground that the state could not regulate these treaty rights, regardless of the effect on the fishery.

The Washington Supreme Court, apparently mindful of the reaction to its *Satiacum* opinions, had a much different attitude now. It reversed seven to one and sent the case back for a new trial, saying the state's evidence should have been admitted. But instead of announcing that it was adopting the Ninth Circuit rule, it seemed to revert all the way back to the old *Race Horse* rule. It said that upon admission into the Union, the state acquired the power to regulate the Indians' off-reservation treaty rights, and that this power could not be denied except on clear and unequivocal expression of congressional will by Congress.

The majority opinion of Justice Rosellini was joined in by four other justices. Two more concurred in the result; they thought that a 600-foot gill net was an improper extension of the fishing right, but that the state could not prevent fishing by traditional gear. One justice dissented.

arrested. Brando was freed on ground that he was seeking publicity only. One of the Indians said the state game department "must think the steelhead [salmon] swam over behind the Mayflower." Aberdeen (Wash.) Daily World, Jan. 22, 1964.

The Present Case

This was the background, then, when the instant case arose. The trial court seemed to adopt the *Race Horse* approach, suggested by the *McCoy* case, that the Indians had no immunity at all from state regulation; it said:²¹

"They [the Indians] are citizens of our country and state, with all the rights, privileges and responsibilities of any other citizen, no more — no less."

But on appeal, the Washington Supreme Court revealed that it felt the Indians had some rights under the treaty, but that those rights were subject to state regulation where "reasonable and necessary to preserve the fishery." It said the state had clearly proven that continued use of the nets involved in the case would result in the nearly complete destruction of the fish, and therefore the state could prohibit the Indians from that sort of fishing.

The court was not explicit as to why its ruling was different than the Ninth Circuit rule (which it characterized as "unworkable"), but evidently it assumed the Ninth Circuit rule would have required the state to cut down or eliminate sports and commercial fishing in the waters involved, before it could restrict the Indian fishing. But if the court below was correct in characterizing these nets as catching almost all the fish which passed that point, elimination of sports and commercial fishing would not have saved the fishery from destruction, and so it seems to us that even under the Ninth Circuit rule the state could have restricted these nets.

In rejecting the Ninth Circuit rule, it is clear that the court below intended the treaty rights to be something less than the Ninth Circuit held. How much less is not clear, but the tone of the opinion implies a great deal less. To the extent that it reduces the rights to anything less than the Ninth Circuit's ruling, NCAI strongly opposes it.

²¹ Appendix to Petition for Certiorari, p. A-18.

CONCLUSION

It would be unfortunate and unfair to the Indians, who still depend so much on hunting and fishing for subsistence, to reduce their treaty rights to such a small residuum as the Washington court apparently intends. There is no need to reduce the rights so drastically, because ordinarily the Indians pose no threat at all to the game and fish resources, and in those cases where they do, the Ninth Circuit rule affords adequate means for redress.

One not familiar with Indians and how they think (at least the typical reservation Indians) cannot appreciate how important hunting and fishing rights are to them, not only because of their poverty, but also because of their Indian traditions. Hunting and fishing (by individuals for subsistence) has a symbolic, perhaps quasi-religious meaning to many Indians. It is a practicing of their ancient culture, something many of them cling to fiercely in the face of the efforts of the state governments, and sometimes even the federal government, to eliminate Indian rights in the name of progress and equality. Many non-Indians feel that treaty promises made 100 years ago have outlived their purpose. The Indian thinks not; to him the treaty promises are as alive as if made yesterday. These promises should not be broken without the agreement of the Indians.

Respectfully submitted,

Albert J. Ahern
Counsel for Amicus

February 1, 1968

FEB 1 1968

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
and the

DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,

Respondents.

On Writ of Certiorari to the Supreme Court of the
State of Washington

BRIEF OF ASSOCIATION ON AMERICAN INDIAN
AFFAIRS, INC., AS AMICUS CURIAE

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DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
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DEPARTMENT OF FISHERIES OF THE
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Respondents.

On Writ of Certiorari to the Supreme Court of the
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BRIEF OF ASSOCIATION ON AMERICAN INDIAN
AFFAIRS, INC., AS AMICUS CURIAE

STATEMENT OF INTEREST

The Association on American Indian Affairs, Inc., a non-profit membership corporation chartered under the laws of the State of New York, is devoted to protecting the rights and promoting the welfare of American Indians. The largest Indian-interest organization in the

country, with over 25,000 members, the Association supports or conducts development programs among Indian communities which range from Eskimo villages north of the Arctic Circle in Alaska to the newly recognized Miccosukee Tribe residing in the Florida Everglades. Because of its deep and long-standing concern with the rights of Indians under the Constitution, statutes and treaties of the United States, the Association has submitted briefs, *amicus curiae*, to this Court in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), and *Menominee Tribe v. United States*, No. 187, October Term, 1967, and to various Federal Courts of Appeals in such leading cases as *Oliver v. Udall*, 306 F. 2d 819 (D.C. Cir. 1962), *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956), and *Arizona v. Hobby*, 221 F. 2d 498 (D.C. Cir. 1954).

The Association's particular interest in the case at bar is to secure not only for petitioner, but also for Indians throughout the country a clear, current ruling that the agreements their ancestors signed in years past still are meaningful and must be respected. Specifically, the holding of the Washington Supreme Court that, notwithstanding treaty language to the contrary, the State may restrict fishing by members of the Puyallup Tribe at sites located both within and without their reservation on the same basis as all other citizens raises once again a serious question about the continued vitality of Indian treaties generally. Cf. *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U.S. 99, 136-142 (1960) (dissenting opinion); *Seneca Nation of Indians v. Brucker*, 262 F. 2d 27 (D.C. Cir. 1958), *cert. den.* 360 U.S. 909 (1959). The Association's experience in working on community development projects indicates that when their ancient rights stand so

in jeopardy, and their culture as well as their economy thus are threatened, progress for Indians just stops.

The Association also has a major interest in encouraging and assisting Indian tribes voluntarily and in orderly fashion to assume ever-increasing responsibility for the conduct of their own affairs. The decision of the court below that the Puyallup Tribe is subject to suit absent consent of the Indians or the United States violates a hitherto well-settled principle of Federal law and, without any transition period, would impose upon tribes burdens which neither they nor Congress have yet seen fit to allow. Since the traditional doctrine of sovereign immunity serves today mainly to insulate the fragile structure of tribal governments and enterprises from outside harassment, the blanket withdrawal of such immunity at this time is likely to cause significant social and economic disruption.

In short, the Association's primary concern herein is to ensure that the treaty rights of the Puyallup Indians and other tribes in Washington, Oregon and Idaho, whose fishing rights were guaranteed by similar treaties, are both fully protected as a matter of law and also recognized as fully consistent with a workable national program for Indian advancement. This brief, *amicus curiae*, is filed pursuant to Rule 42(2) of the Supreme Court Rules. Written consent of all parties to its submission accompanies the signed original copy of the brief.

STATEMENT OF THE CASE

This case started more than one hundred years ago. On December 26, 1854, Isaac S. Stephens, Governor and Superintendent of the Territory of Washington, and his delegation, met at Medicine Creek with representa-

tives of "the tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets," to execute a treaty providing for the cession to the United States of most of the vast area these Indians, including petitioner, then occupied. 10 Stat. 1132. Excepted out of the foregoing grant were (1) certain relatively small described tracts of land (Article II), and (2) "The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." (Article III)

The Puyallup Reservation, established in accordance with the Treaty of Medicine Creek, subsequently was expanded by the Executive Orders of January 20, 1857, and September 7, 1873. The Puyallup River flows through the reservation, emptying into Commencement Bay. Relying upon the treaty commitment described above, the Puyallup Indians fished in the waters of the Puyallup River and Commencement Bay within, and at usual and accustomed places outside, their reservation for almost a century with little or no interference.

In 1954, however, the State charged one Robert Satiacum, a Puyallup Indian, with fishing in violation of the Washington conservation laws, to wit: the possession of game fish during a closed season and the use of fixed nets to catch game fish at two locations, one a usual and accustomed fishing ground of the Puyallup Indians outside the reservation and the other a site inside the Puyallup Reservation, although on land not then in Indian ownership. The case eventually was appealed to the Washington Supreme Court, which affirmed a decision of the Superior Court dismissing the prosecution. *State v. Satiacum*, 50 Wash. 2d 524, 314 P. 2d 400 (1957).

Some ten years later, the State once again has sought to restrain members of the Puyallup Tribe from exercising fishing rights secured to them by the United States, this time through the device of a civil declaratory judgment proceeding aimed at the entire tribal membership. Specifically, respondents instituted this action in the Superior Court of the State of Washington through the filing of a complaint alleging that Puyallup Indians were engaged in net fishing in the Puyallup River watershed and Commencement Bay in violation of the regulations of the State Department of Fisheries, and requesting a judgment declaring that the Puyallup Tribe, Inc.¹ and certain named individual defendants were not entitled to any privileges and immunities from application of State conservation measures. Petitioner answered by challenging the court's jurisdiction and asserting, as an affirmative defense, that neither the Puyallup Tribe nor the individual defendants as members thereof are subject to State conservation laws when exercising fishing rights reserved to such tribe by the Treaty of Medicine Creek.

On May 27, 1965, the Superior Court entered its Memorandum Decision holding (1) that there is no Puyallup Tribe which succeeds in interest to the rights of the Puyallup signers of the Treaty of Medicine Creek, (2) that the Puyallup Reservation, established in accordance with that treaty, has ceased to exist, and (3) that, despite its finding that Indian fishing (in

¹As the Washington Supreme Court pointed out: "The case caption is erroneous, there being no entity known as the Puyallup Tribe, Inc., a corporation." Opinion below, reprinted in Appendix to Petition for Writ of Certiorari (hereinafter "Pet. A —") at p. 36 (fn.).

1964) accounted for only 3-5% of the total catch, the regulations sought to be enforced by the State were reasonably necessary for the preservation of salmon and steelhead fish. Subsequently, the court entered a decree enjoining all members of the Puyallup Tribe from fishing in the Puyallup River watershed and Commencement Bay except in compliance with the rules and regulations of the Department of Fisheries.

Upon appeal by the tribe, the Washington Supreme Court reversed the lower court's finding that the Puyallup Tribe no longer was in being, but held (1) that the Puyallup Reservation had ceased to exist, and (2) that members of the Puyallup Tribe exercising treaty-reserved fishing rights are subject to restrictions by the State not shown to be indispensable to preservation of the fishery. Although the petitioner and *amicus curiae* again challenged the Superior Court's jurisdiction, the court below failed to rule upon the key question of whether the Puyallup Tribe enjoys sovereign immunity from suit. Because the original injunction entered by the lower court, reflecting its determination that the Puyallup Indians had no treaty fishing rights, prohibited members of petitioner from fishing contrary to all regulations of the Department, the Supreme Court remanded the case "for entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery." Pet. A-52.

The opinion of the Washington Supreme Court, issued January 12, 1967, became a final judgment two months thereafter. On June 2, 1967, the Superior Court entered its amended injunction permanently re-

straining all members of petitioner "from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington." Pet. A-68. This Court granted certiorari on December 18, 1967.

QUESTIONS PRESENTED

I. Whether Indians exercising the rights guaranteed pursuant to treaty with the United States to fish within their reservation boundaries and at usual and accustomed sites located outside of the reservation are subject to State regulations not shown to be indispensable to the preservation of the fishery.

II. Whether a recognized tribe of American Indians may be sued without its consent or that of the United States.

ARGUMENT

I. THE DECISION OF THE WASHINGTON SUPREME COURT THAT THE STATE POSSESSES GENERAL AUTHORITY TO CONTROL FISHING BY PUYALLUP INDIANS, REGARDLESS OF THE SITE OF THAT ACTIVITY, CONTRAVENES THE TREATY OF MEDICINE CREEK.

A. Members of the Puyallup Tribe Fishing Within the Exterior Boundaries of Petitioner's Reservation Are Not Subject To Any State Regulation.

As partial consideration for petitioner's cession of substantial and valuable lands under the Treaty of December 26, 1854, 10 Stat. 1132, the United States established the Puyallup Reservation and guaranteed the Puyallup Indians a continuing right of taking fish

at all usual and accustomed places.² This Court and the lower Federal courts uniformly have upheld the power of Indians freely to fish within the exterior boundaries of their reservations without interference from State authorities. *United States v. Winans*, 198 U.S. 371 (1905); *Moore v. United States*, 157 F. 2d 760 (9th Cir. 1946); *cert. den.* 330 U.S. 827 (1947); *Mason v. Sams*, 5 F. 2d 255 (W.D. Wash. 1925); *In re Blackbird*, 109 Fed. 139 (W.D. Wis. 1901); see *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). Moreover, since Indian treaties contemplate retention by the tribes in lands set aside for their use of all previously existing privileges and immunities, the right to fish within the boundaries of the reservation exclusive of State restrictions does not depend upon the existence of express treaty language so providing.³ *United States v. Winans*, *supra*; *Moore v. United States*, *supra*; see *Winters v. United States*, 207 U.S. 564 (1908).

While not challenging the foregoing principles, the court below decided that the members of the Puyallup Tribe no longer have "any special or treaty rights to fish" within reservation boundaries because "there is no longer a reservation" (Pet. A-51), and that State conservation measures, therefore, are applicable on

² The right to fish, just as much as the land itself, constitutes a compensable property interest which may not be extinguished without action of Congress and payment of just compensation. *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Whitefoot v. United States*, 293 F. 2d 658, 663 (Ct. Cl. 1961), *cert. den.* 369 U.S. 818 (1962).

³ For State cases to the same effect, see *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557 (1930), and *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. den.* 377 U.S. 999 (1964).

such lands to restrict Indian fishing. That holding is contrary to the overwhelming weight of authority requiring Congressional sanction for dissolution of an Indian reservation (which approval may not be found in allotment of the land or the conveyance of fee patents, the factors cited by the Washington Supreme Court) and, accordingly, is erroneous as a matter of law.

This Court has made abundantly clear that only Congress has the power to abolish an Indian reservation. *Seymour v. Superintendent*, 368 U.S. 351 359 (1962); *Creek County v. Seber*, 318 U.S. 705 (1943); *United States v. Celestine*, 215 U.S. 278 (1909). In *Celestine*, for example, this Court upheld exclusive Federal jurisdiction over a Tulalip Indian alleged to have committed a murder on patented land located within his tribe's original reservation, because:

when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. (215 U.S. at 285)

No legislative intent to effect termination can be found with respect to the Puyallup Reservation. Indeed, the rule that the conveyance of patents in fee to reservation land does not reflect a Congressional purpose to discontinue the special status accorded Indian reservations is conclusively evidenced by the Act of June 25, 1948, 62 Stat. 757, 18 U.S.C. 1151, as amended, which defines "Indian Country" for purposes of assertion of Federal jurisdiction to include:

all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any*

patent, and, including rights-of-way running through the reservation. . . . (Emphasis added.)

The application of Federal law to Indians on lands within a reservation patented and sold to a non-Indian, and the prohibition against the exercise of State jurisdiction in such situations pursuant to the 1948 Act, repeatedly have been sustained. *Seymour v. Superintendent, supra*; *Guith v. United States*, 230 F. 2d 481 (9th Cir. 1956); *State v. District Court*, 125 Mont. 398, 239 P. 2d 272 (1951).

Furthermore, the cases are legion to the effect that allotment does not oust exclusive Federal jurisdiction over Indian reservations with respect to matters involving Indians or otherwise so erase reservation boundaries as to sanction the application therein of State laws. *Seymour v. Superintendent, supra*; *United States v. Ntce*, 241 U.S. 591 (1916); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Celestine, supra*. Indeed, with specific reference to the Puyallup Reservation, this Court in *United States v. Celestine, supra*, quoted with approval from the opinion of Judge (subsequently Mr. Justice) McKenna in *Eells v. Ross*, 64 Fed. 417 (9th Cir. 1894) as follows (215 U.S. at 287):

“It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (The Kansas Indians [Blue Jacket v. Johnson County] 5 Wall. 737, 18 L. ed. 667), and citizen-

ship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. *Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain.*' (Emphasis added.)

Eells v. Ross, supra, affirmed the continued existence of the Puyallup Reservation following enactment of the Puyallup Allotment Act, and no legislation with respect to such lands has been passed since that case was decided of sufficient import to warrant changing the conclusion.⁴ In short, Congress, which has the power, has not abolished petitioner's reservation, and the Supreme Court of the State of Washington has not the authority to do so. With respect to fishing on the reservation, the holding of the lower court that the Puyallup Indians are subject to State control is in irreconcilable conflict with the Treaty of Medicine Creek and must be reversed.⁵

⁴ In marked contrast to the general acts relied upon by the court below, when Congress actually has determined to end the status of an Indian reservation and thereby eliminate special rights secured to tribal members by Federal treaty, a statutory intent to do so usually has been clear. *Klamath and Modoc Tribes v. Maison*, 338 F. 2d 620 (9th Cir. 1964). This Court, however, now has under advisement the question of whether a treaty hunting right even survives termination. *Menominée Tribe v. United States*, No. 187, October Term, 1967.

⁵ Assuming, *arguendo*, that the Puyallup Reservation no longer exists, the lands within its original boundaries still are "usual and accustomed" fishing grounds. Pet. A-44, 51. As the following discussion will demonstrate, petitioner's members also enjoy a far greater immunity from State regulation over fishing at such sites than their non-Indian fellow citizens.

B. Members of the Puyallup Tribe Fishing "At All Usual and Accustomed Grounds and Stations" Outside Petitioner's Reservation Are Subject Only to Regulations Demonstrated by the State To Be Indispensable to the Conservation of the Fish.

Under Article III of the Treaty of December 26, 1854, *supra*, the United States pledged for the benefit, *inter alia*, of petitioner's members that:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory . . .

There is no dispute that the fishing at issue in the instant case, other than that conducted within the reservation, occurred at such "usual and accustomed" sites. The court below concluded, however, that Puyallup Indians may be restricted by the State in the exercise of their off-reservation fishing rights by application of so-called "reasonable and necessary" regulations. This decision is premised upon a fundamental misconception both of the rights secured to petitioner by the Treaty of Medicine Creek and of the burden which the State must bear in order to justify imposition of restrictions upon members of the Puyallup Tribe.

As the historical context makes plain, the purpose of Article III was (1) to preserve to the signatory tribes rights, already existing, to fish freely at "usual and accustomed" places located outside the reservations to be established in accordance with the treaty, and (2) to grant to "citizens" the privilege, not previously enjoyed, to fish at such places "in common" with the members of the tribes. Of the identical clause in the Yakima Treaty of June 9, 1855, 12 Stat. 951, this Court explained in *United States v. Winans*, 198 U.S. 371, 381 (1905):

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted.

The new condition referred to in *Winans*, of course, was the arrival of the settlers. In anticipation of this event, the treaty required the Indians to allow the "citizens" to share the former's usual and accustomed fishing places. But the treaty no less clearly acknowledged and promised to secure the right of the Indians—limited only by the requirement as to common use—to continue to take fish at such locations. *State v. Saticum*, 50 Wash. 2d 524, 314 P. 2d 400, 406 (1957) (opinion of Donworth, J.).

Reflecting the special status of off-reservation treaty fishing rights, this Court has held that lands lying between Indian reservations and usual and accustomed fishing sites were subjected under the treaty to an equitable servitude permitting the Indians to cross such lands, despite the conveyance in fee of the intervening tracts to non-Indian owners without mention of any restrictions. *United States v. Winans, supra*; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919). In *Talee v. Washington*, 315 U.S. 681, 685 (1942), this Court also concluded that the State of Washington "is without power to charge the Yakimas a fee for fishing" outside their reservation, despite the nominal amount involved and the regulatory purpose of the measure in

question. What has really troubled the State and lower Federal courts, though, in construing the scope of off-reservation treaty fishing rights during the past twenty-five years is how far the dictum in *Tulee* to the effect that the State may impose upon Indians "restrictions of a purely regulatory nature . . . necessary for the conservation of fish" (315 U.S. at 684) modifies this Court's statement with respect to the licensing scheme there under consideration that the regulation must be "indispensable to the effectiveness of a state conservation program." *Id.* at 685.

A persuasive argument can be made that the State of Washington has no jurisdiction whatsoever to regulate off-reservation fishing at usual and accustomed places by treaty Indians.⁶ As noted above, implicit in the very nature of the Treaty of Medicine Creek is the subordination by the Indians of their own sovereignty and powers as a nation to those of the United States, and the solemn undertaking by the United States to protect and secure the members of the Puyallup Tribe in the exercise and enjoyment of the property rights reserved by and for them under the Treaty. Such a protective relationship, this Court consistently has held, suffices in and of itself to place the property, activity or other subject matter enjoying the special Federal protection under the exclusive jurisdiction of the United States. *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Celestine*, 215 U.S. 278 (1909); *United States v. Kagama*, 118 U.S. 375 (1886); *Worcester v. Georgia*, 6 Pet. 515 (1832).

⁶ A number of courts have expressly so ruled with respect to off-reservation treaty hunting rights. *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F. 2d 1013 (9th Cir. 1967); *State v. Arthur*, 74 Idaho 251, 261 P. 2d 135 (1953), *cert. den.* 374 U.S. 937 (1954).

Exclusive jurisdiction does not depend upon the place where the property is located or upon the activity being conducted. It exists as to the particular property, activity or other subject matter under Federal protection, even though no Indian reservation is involved and even though the place and subject matter are otherwise fully subject to State power and law. *United States v. McGowan*, *supra*; *United States v. Nice*, *supra*; *Perrin v. United States*, 232 U.S. 478 (1914); *United States v. Thomas*, 151 U.S. 577 (1894); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876); *The Kansas Indians*, 5 Wall. 737 (1867). The protective interest of the United States evidenced in and by the Treaty of Medicine Creek extends to the fishing activities of the Puyallup Indians at all usual and accustomed places outside their reservation, and this matter, in accordance with the rule established in the foregoing cases, is, therefore, within the exclusive jurisdiction of the United States. Under such circumstances, the power to regulate off-reservation fishing can be exercised only by the Federal Government,⁷ and not by the State of Washington.⁸

⁷ On July 15, 1967, the Secretary of the Interior issued final regulations governing "Off-reservation Treaty Fishing." 32 Fed. Reg. 10433 *et seq.* Although the Secretary's authority to limit Indian fishing is far from clear, see *Mason v. Sams*, 5 F. 2d 255 (W.D. Wash. 1925), and the new regulations fail to provide any standard for exercising Secretarial control, their promulgation illustrates how State restrictions may impinge upon a Federal function.

⁸ The decision in *Kennedy v. Becker*, 241 U.S. 556 (1916), does not militate against this conclusion. In that case, the United States merely approved a private sale by Indians to other persons of lands in an existing State. In this case, the Puyallup Indians conveyed their land directly to the United States, and the Federal Government undertook a continuing obligation to secure them the fishing rights reserved under the treaty on lands outside the reservation but not within an existing State.

This Court, however, need not—and in the opinion of *amicus curiae* should not—strike down all State controls over off-reservation Indian fishing in order to rule for petitioner herein. The power to fish is not the power to destroy. Consistent with the original intent of Article III and mindful of the fact that most Indians still fish for subsistence purposes, this Court properly can (and should) hold that only such State conservation measures as are indispensable to the preservation of the fishery may be enforced at usual and accustomed off-reservation fishing sites against members of the Puyallup Tribe and other treaty Indians. *Maison v. Confederated Tribes of the Umatilla Reservation*, 314 F. 2d 169 (9th Cir. 1963), *cert. den.* 375 U.S. 829 (1964); *Makah Indian Tribe v. Schoettler*, 192 F. 2d 224 (9th Cir. 1951). As the court pointed out in the *Umatilla* case, conservation necessarily involves the allocation of a limited-resource among those demanding to share in it—in this case commercial and sports fishermen, who in 1964 accounted for some 95%-97% of the total salmon catch, as well as Indians. Pet. A-32. Since non-Indians have a mere privilege to take fish, *Geer v. Connecticut*, 161 U.S. 519, 532 (1896), as contrasted with the treaty right vested in the Puyallup Tribe, “restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others.” *Maison v. Confederated Tribes of the Umatilla Reservation*, *supra*, at 173.

Unlike the Ninth Circuit, the court below made no inquiry into the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing, or by other means not having so severe an impact upon peti-

tioner's members. Similarly, the court below did not consider whether preservation of the Puyallup River fishery, even assuming the need for some regulation, requires so severe a curtailment of Indian fishing as the State has imposed. (One issue ignored by the Washington Supreme Court, for example, is whether the goal of conservation could not be attained through imposition of regulations designed to effect the minimum escapement level necessary for propagation. See *Makah Indian Tribe v. Schoettler*, *supra*.) In other words, by adopting a "reasonable and necessary" standard, the lower court ruling affords members of the Puyallup Tribe no greater rights than those guaranteed to all persons in the State of Washington under the Fourteenth Amendment, and, for all practical purposes, gives no recognition or effect to the Treaty of Medicine Creek. *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *Begay v. Sawtelle*, 53 Ariz. 304, 88 P. 2d 999 (1939).

The decision below is patently contrary to the manifest intent of the treaty, to wit: to provide a small and distinct racial minority with legally enforceable rights, as opposed to privileges protected only by the requirements of equal treatment and the political process. As the facts of this case make painfully clear, the State of Washington, rather than restrict the more populous and powerful groups which account for the vast majority of salmon caught each year or the industries which pollute the waters in which the fish breed, has sought to prohibit through regulation fishing by a handful of Indians, including those who fish to live. If the Treaty of Medicine Creek is to have continued meaning, such an effort cannot be allowed to succeed.

II. THE PUYALLUP TRIBE IS NOT SUBJECT TO SUIT WITHOUT THE CONSENT OF THE TRIBE AND THE UNITED STATES, AND SUCH CONSENT HAS NOT BEEN GRANTED.

The immunity of Indian tribes from suit, absent consent of the tribe or the United States, is too firmly established in the law now to be questioned. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Haile v. Suunooke*, 246 F. 2d 293 (4th Cir. 1957), *Cert. den. sub nom. Haile v. Eastern Band of Cherokee Indians*, 355 U.S. 893 (1957); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F. 2d 529 (8th Cir. 1967); *Maryland Casualty Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F. 2d 517 (5th Cir. 1966): As this Court made plain in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. at 512-3:

The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations [the Choctaws] are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal property did. (Footnotes omitted)

As a matter of fact and law, the United States has not authorized suits against the Puyallup Tribe, and the record herein contains no indication to the contrary. Petitioner not only has never consented to be sued, but has vigorously opposed assertion of jurisdiction in this case on grounds of sovereign immunity.

The conclusion, therefore, is inescapable that the Puyallup Tribe may not be sued in the courts of the State of Washington without its consent or that of the

United States. Nonetheless, the Washington Supreme Court, without even discussing the point, upheld the lower court's jurisdiction over the petitioner. Unless that unprecedented holding is reversed by this Court, the opinion below may serve as the predicate for further erosion by State courts of tribal immunity, thereby exposing the limited resources of Indian governments to indiscriminate litigation.

CONCLUSION

For the reasons set forth in this brief, the Association on American Indian Affairs, Inc., as *amicus curiae*, urges this Court to reverse the decision of the Supreme Court of the State of Washington.

Respectfully submitted,

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FEB 14 1968

UNIT. STATES SUPREME COURT

In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PUYALLUP TRIBE, PETITIONER

v.

**DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
ET AL.**

NUGENT KAUTZ, ET AL., PETITIONERS

v.

**DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
ET AL.**

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF WASHINGTON**

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, PETITIONER.

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

ET AL.

No. 319.

NUGENT KAUTZ, ET AL., PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The principal question presented in these cases is to what extent, if any, a State is free to regulate off-reservation fishing by Indians who have been guaranteed by federal treaty the "right of taking fish, at all usual and accustomed grounds and stations, * * * in

common with all citizens of the Territory.”¹ The issue is raised here as between the State of Washington and the Puyallup and Nisqually Indians, both tribes claiming under Article III of the Treaty of Medicine Creek of March 3, 1855 (10 Stat. 1132). The same question, however, arises with respect to a dozen other Indian Tribes in several States under substantially identical provisions of other treaties.² Although the problem is not new and has produced substantial litigation in the lower courts, both State and federal, it has never been definitely resolved by this Court. There are, to be sure, sometimes inconsistent *dicta* on the subject in opinions rendered here, to which we advert; but, essentially, we urge the Court to look at the question afresh, re-interpreting the original understanding in light of contemporary realities.

I

The initial question is whether the treaty stipulation just quoted does more than merely assure the Indians the *same* right to fish as others enjoy at the

¹ For the purposes of this case, we assume the correctness of the State court's conclusion in No. 247 that the fishing grounds at issue are not within the present boundaries of the Puyallup Reservation. The only question of recurring importance—which arises at all events in No. 319—is that stated in the text.

² See Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty with the Nez Perce (12 Stat. 957), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinaielt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III.

specified locations. If so, their fishing may of course be restricted, or even prohibited, by general regulations which validly apply also to everyone else. The argument for that result would focus on the fact that no exclusive right is granted, but, rather, a mere right to fish "in common with all citizens of the Territory." And it would be stressed, also, that the fishing sites involved are outside the reservation, at places otherwise fully subject to State jurisdiction. See *Kennedy v. Beecker*, 241 U.S. 556, 564. In our view, however, that contention cannot stand.

Indeed, if the only guarantee to the Indians was freedom from discrimination in their fishing at the specified locations, the treaty has no effect today, since Indians, as citizens subject to State jurisdiction when off their reservation, are presumably entitled to equal protection anyway. Yet, as this Court has said of the contention that "the Indians acquired no rights * * * but such as they would have without the treaty," "[t]his is certainly an impotent outcome to negotiations and a convention, which seemed to promise more, and give the word of the Nation for more." *United States v. Winans*, 198 U.S. 371, 380. Moreover, if mere equality of rights was granted, why is it that the Indians, unlike other citizens, retain a privilege of access to the fishing grounds after the adjacent lands have passed into private ownership, as this Court has held? See *United States v. Winans*, *supra*; *Seufert v. United States*, 249 U.S. 194. And why do the Indians alone enjoy an immunity from taxation in exercising their right to fish? *Tulee v. Washington*, 315 U.S. 681.

The answer is that the Indians, by virtue of the treaty, enjoy a federal *right* to take fish at particular locations, whereas others do not. In part, this is a property right which carries with it an easement over the adjacent land, although privately owned, to gain access to a fishing site. That, however, is a rather secondary aspect of the grant. The right runs also against the State, qualifying the new sovereign's otherwise absolute dominion over the wildlife of the territory and the consequent power to regulate, or even, prohibit, the taking of fish. See *Geer v. Connecticut*, 161 U.S. 519; *Lacoste v. Dept. of Conservation*, 263 U.S. 545, 549. The exemption from taxation in the exercise of the treaty right (*Tulee, supra*) is an illustration of this principle, being an immunity which even the fee owner of the riparian property does not enjoy as a matter of right because his fishing is a mere privilege that may be granted or withheld by the State, and therefore licensed on any reasonable conditions. But the tax exemption does not exhaust the treaty guarantee. The same reasons must also give some exemption from *regulation*; the "right" would not deserve the name if it could be destroyed or abridged by prohibitions and restrictions.

To hold otherwise would not carry out the terms of the treaty "in accordance with the meaning they were understood to have by the tribal representatives" who ceded the tribal lands on the condition that their fishing rights would be preserved (*Tulee, supra*, 315 U.S. at 684). For it is well known that, to all these tribes of the Pacific Northwest, fishing was "not much less necessary to the existence of the Indians than the

atmosphere they breathed" (*Winans, supra*, 198 U.S. at 381). And see No. 247, A. 11, 26. To be sure, "it is idle to suppose that there was any actual anticipation at the time the treaty was made" that the State would find it necessary to restrict fishing (*Kennedy v. Becker, supra*, 241 U.S. at 563). But it does not follow—at least where no State sovereignty yet existed³—that the failure expressly to foreclose State regulations should expose the right to destruction or serious dilution. On the contrary, one supposes that, if modern conservation laws had been foreseen, at least a partial exemption would have been written into the treaty for the benefits of the Indians whose way of life was so bound up with fishing. That fact should be given some effect if we are to construe the treaty guarantee "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people" (*Tulee, supra*, 315 U.S. at 684-685).

There can be no question as to the propriety of recognizing a limited exemption from State regulation for Indians in whom the United States confirmed a right to continue fishing at "usual and accustomed grounds and stations." There is no reason why the

³ In *Kennedy v. Becker*, the transfer of lands from the Seneca Tribe to Robert Morris, with a reservation of fishing rights, was made with the knowledge that the area would come under the jurisdiction of the State of New York, and the Court reasoned that "the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." 241 U.S. at 563. That case is also distinguishable from ours in that the United States was not the transferee and was not the guarantor of the continuing fishing rights of the Indians.

tribes, in ceding a portion of their lands, could not reserve fishing rights without reserving the fee. Indeed, as we have seen, this Court has held that they did reserve a perpetual easement over the adjoining property (*Winans* and *Seufert, supra*). So, also, merely because they abandoned tribal sovereignty over these areas for other purposes, they were not required to subject themselves to foreign regulations affecting their fishing at specified locations. Cf. 18 U.S.C. 1162(b).

Nor must the exemption have terminated when the United States relinquished its jurisdiction to the State. Just as Indian reservations survived statehood without becoming subject to State laws (*Winters v. United States*, 207 U.S. 564), fishing rights could be immunized from local regulations after the area involved was transferred to State jurisdiction. As this Court observed in *Winans, supra*, 198 U.S. at 384, "surely it was within the competence of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish' at all usual and accustomed places." And, here—unlike other grants (e.g. *Ward v. Race Horse*, 163 U.S. 504)—it is clear the guarantee was meant to be permanent, surviving statehood and the issuance of patents: "the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees," *Winans, supra*, 198 U.S. at 381–382. See also, *Tulee, supra*, 315 U.S. at 684.

II

What has been said thus far might lead to the conclusion that Indians whose fishing rights have been

confirmed by treaty are absolutely immune from outside regulation and may fish at any time, in any manner without limit. That was, indeed, the Court's apparent assumption in *Ward v. Race Horse*, 163 U.S. at 514, where it was observed that, while, normally, the States are empowered "to regulate the killing of game within their borders," nevertheless, "if the treaty applies * * * that State would be bereft of such power." Yet, *dicta* in *Winans, supra*, 198 U.S. at 384, *Tulee, supra*, 315 U.S. at 684, and *Village of Kake v. Egan*, 369 U.S. 60, 75, might be read as indicating that the exercise of these treaty rights is fully subject to "restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish" (*Tulee, supra*). We suggest a middle course.

The difficulty with either extreme is easily demonstrated. If the treaty rights of the Indians are so paramount as to be wholly beyond any regulation, then, hypothetically, the Indians are free to destroy the fishery by excessive fishing. Not only would that be a harsh result, but it seems inconsistent with the non-exclusive character of the right guaranteed. Having agreed to share their fisheries "in common with all citizens of the Territory," the Indians cannot be permitted in effect to exclude all others by appropriating to themselves the entire resource. On the other hand, the special right of the Indians would have no substantial recognition if the State were permitted to prohibit or very severely limit their fishing, merely because such regulations were necessary as to other fishermen in the interest of conservation. There is no question of equal

treatment here: unlike ordinary citizens who fish only as, if and when the State allows it, the Indians retain a portion of their ancient rights, prior in time and once exclusive, recognized and confirmed by the superior authority of the United States. Indian fishing pursuant to a treaty can be limited, but only so far as is necessary to preserve the resource; it cannot be restricted simply to achieve uniformity or to allay the jealousy of the non-Indian fisherman whose activities the State is free to curb. In sum, there must be an accommodation of federal treaty rights and State conservation policy which does not wholly sacrifice either interest.

Though these broad guidelines do not immediately resolve concrete cases, they do indicate a direction. This would require rejection of both the absolute immunity for treaty fishing recognized by the Idaho Supreme Court (see *State v. Arthur*, 74 Idaho 251, 261 P. 2d 135) and the view apparently held by the court below that Indians must be subjected to whatever general regulations are shown to be necessary for conservation—whether or not special exemptions or adjustments can be made for Indian fishing without endangering the resource. In our view, the Court of Appeals for the Ninth Circuit has outlined the correct approach in *Makah Indian Tribe v. Schoettler*, 192 F. 2d 224, and *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169, by declining to sustain the State's claim of power indiscriminately to apply general fishing restrictions to Indians exercising treaty rights in circumstances where it was apparent that the ends of conservation

could be fulfilled by exempting the relatively insignificant tribal fishing or devising less restrictive rules for them and imposing more severe limitations on others.*

Of course, each situation requires a particularized assessment. But the goal, in our view, should be to allow the Indians the widest possible measure of freedom in exercising their historic rights, when-

*In *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 186 F. Supp. 519, affirmed 314 F. 2d 169, the State of Oregon contended that it had the right to preclude all fishing on the Columbia and Snake Rivers during the spawning season notwithstanding the fact that these tributaries were the ordinary and accustomed grounds of the Indians. The court rejected the State's contention because it found the number of fish taken by the Indians was but a small percentage of the total and that the same conservation purpose could be served by restricting fishing at other areas through which the fish passed on the way to those tributaries, or by limiting the fishing by sports fishermen who had taken over 4,600 breeder fish which had actually arrived at the tributaries.

In *Makah Indian Tribe v. Schoettler*, 192 F. 2d 224, a State conservation law prohibited any fishing in the Hoko River except by pole and line. The court held that this law could not be applied to the Indians because there was a more reasonable method of conservation available—a partial stopping of fishing during the fish run. The court ruled that the fact that this method of conservation might be more expensive for the State to police could not justify depriving the Indians of their treaty-secured right to fish in the Hoko River.

Another example is provided by *Confederated Tribes of the Umatilla v. Maison*, 262 F. Supp. 871, in which the Oregon Game Commission sought to sustain its right to enforce against the Indians laws restricting the right to hunt for deer and elk. The evidence showed that the Indians killed 300-350 deer and 150-175 elk per year, while sportsmen killed 9,055 elk and 24,222 deer per year, and that the supply of elk and deer had been increasing. The court ruled that in these circumstances the State law could not be applied to the Indians.

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ever conservation can be achieved by reasonable restrictions imposed elsewhere. No doubt, the need for making such accommodations is burdensome for the States involved. But the rights of the Indians should not be sacrificed unless something more than convenience is involved. See *Tulee*, *supra*, 315 U.S. at 685. Moreover, the Secretary of the Interior, by recent regulations, has undertaken to assume a large part of the burden. Thus, it is contemplated that the Secretary, in cooperation with the relevant State authorities and the tribal government, will promulgate appropriate restrictions on off-reservation fishing by Indians and will furnish identification to those entitled to exercise treaty rights. See 25 C.F.R., Part 256.⁵ Once the basic standards are announced by this Court, it should not be difficult for State, federal and tribal authorities to reach workable arrangements which fairly accommodate the competing rights and interests.

III

Turning to the cases before the Court, we conclude that the judgments below must be reversed. Indeed, although it set aside the trial court's injunction against the Puyallup Indians (No. 247, A. 53-54) and modified that entered against the Nisqually Indians (No. 319, A. 16), the Washington Supreme Court gave no practical recognition to the tribal rights guaranteed by the Treaty of Medicine Creek. Because federal treaty rights were involved, the court did insist

⁵ The general regulations, to be followed by particularized area regulations, are printed in the Appendix to the initial Memorandum filed by the United States in these cases, pp. 10-17.

that the State establish that the restrictions applied to the Indians are "reasonable and necessary for the preservation of the fishery" (No. 247, A. 55). But there is really no dispute on this point: if the initial premise is that other rules are to remain as they are and the question is whether the existing restrictions on fishing in Commencement Bay and in the Puyallup and Nisqually Rivers need be applied to *all* fishermen in those areas or *none*, the answer is doubtless that conservation demands it.⁶ The court's error, in our view, was in declining to consider whether, consistent with the overall goal of conservation, it was not possible to provide an exemption, or at least some relaxation of existing regulations, for Indians exercising their treaty rights.

We need not suggest precisely the accommodation that might be made. We point out, however, that apparently undisputed facts of record in No. 247 reveal quite clearly that a total prohibition of net fishing by the Puyallups at their "usual and accustomed grounds" is not necessary to preserve the fishery. Thus, we are told that the Indians are responsible for only 3% to 5% of the total catch and that the use of nets is permitted for some 99% of the annual fish run outside the areas where treaty rights apply. On the face of these statistics, it would seem feasible to make some adjustment in favor of Indian fishing by slightly

⁶ That is apparently the conclusion reached on remand by the State trial court in the *Puyallup* case. See No. 247, A. 69. See, also, Judge Hunter's dissent below which argues, correctly in our view, that the remand ordered by the majority of the Washington Supreme Court is meaningless (No. 247, A. 65-66).

curbing commercial fishing in Puget Sound (see No. 247, A. 178-179). At least, we submit the State should have been required to show the impracticability of some such adjustment before being permitted to outlaw all net fishing by the Indians in the Puyallup River.

In No. 319 the record is too bare to permit any concrete suggestion as to methods of accommodation. The matter is not foreclosed, however, by the stipulation that Indian fishing by present methods "[i]f permitted to continue * * * would virtually exterminate the salmon and steelhead fish runs of the Nisqually River" (No. 319, A. 6, 8, 9). For, again, that may be true today only because excessive fishing downstream by others severely reduces the breeding stock that reaches the "usual and accustomed grounds" of the Tribe. And, at all events, if some limitation on Indian fishing is necessary, perhaps at certain periods of the year, it may be that measures short of an absolute prohibition on netting will accomplish the purpose if other fishing is more severely restricted.

Respectfully submitted.

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COURT U. S.
October Term 1967

No. 247

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THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
and the

DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

Brief of the Confederated Bands and Tribes
of

The Yakima Indian Nation

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ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

Brief of the Confederated Bands and Tribes
of
The Yakima Indian Nation

INTEREST OF AMICUS CURIAE

The Yakima Indians, which now compose the Confederated Bands and Tribes of the Yakima Indian Nation, like the Puyallup Indians, have lived on lands and fished in rivers or streams that are in or border the State of Washington since time immemorial.

In 1855, under the treaty of Walla Walla, they ceded a large portion of their lands (16,920 square miles), reserving a small portion (1,875 square miles) for their exclusive use. As it had previously been necessary for existence that all the aboriginal area and its bounty be utilized they also reserved among other things "the right of taking fish at usual and accustomed places in common with the citizens of the territory."¹ This reservation is almost identical in wording to the provision of the Medicine Creek Treaty in issue.

The Confederated Bands and Tribes of the Yakima Indian Nation presently has 5,652 members. Approximately two-thirds of these members reside within the area ceded to the United States or reserved by the Yakima Nation. Many of these members are dependent upon the traditional Yakima fisheries for—or to supplement—their low standard of living. The Yakima Nation is a functioning sovereignty which regulates its members in their utilization of this tribal right at both on and off reservation fisheries as to time, place and method of fishing. The State of Washington by law and regulation totally prohibits any fishing by members

¹ 12 Stat. 951

utilizing their traditional methods at any of these fisheries. In the immediate past, and particularly in 1966, the State authorities embarked on an accelerated enforcement program which resulted in a multiplicity of arrests for violation of state fishing laws and regulations. Where Yakima members were abiding by tribal conservation regulations the Tribal Attorney of the Yakima Nation—and the United States Attorney—assumed their defense. Though the State of Washington was unsuccessful in any of these cases in obtaining convictions and failed, or did not attempt, to prove state regulation was reasonable or necessary, this harassment seriously limited the enjoyment of the members of the Yakima Nation in their exercise of the fishing rights reserved by treaty and consequently resulted in serious hardship to these members and their families. One of these cases, *State vs. James*, 72 Wn. 2d 738 (1967) reached the Washington State Supreme Court, which affirmed the decision of the trial court dismissing the State's Complaint. Since the State of Washington has taken no further action in said case, the Yakima Nation has no other way than by means of this case to bring its position to the attention of this court.

There has been some hope that there would be co-operation in the management of the Columbia River Fisheries. This hope has been destroyed by recent action of State fish management agencies. Governor Tom McCall of Oregon had asked that representatives of the

Indian tribes involved, representatives of the Secretary of the Interior and representatives of the State fish management agencies meet in council for the purpose of discussing the regulations of tribe, Secretary of Interior and the States to further conservation on the Columbia. In December it appeared that there was some hope that Indian treaty rights would be recognized, when Washington State officials announced that consideration would be given towards promulgating state regulations authorizing Indian fishing at usual and accustomed places. However, at the last meeting of the council on February 15, 1968, the hope of Governor McCall, the tribes and Federal agencies was destroyed by the position taken by the State fish management agencies. Fish management agencies of Washington and Idaho announced that they would await the decision of this court in this case before recognition of Indian treaty fishing rights. This position was then adopted by the Oregon Fish Commission and Governor McCall, who was chairman, adjourned the meeting in frustration until further call.

Therefore, though there has been no attack on the quality of the Yakima Nation's conservation regulations which are in effect and though the Secretary of the Interior has passed regulations covering Indian fishing on the Columbia, the State of Washington continues to refuse to recognize any Indian treaty right and by law and regulation totally prohibits Indian

treaty fishing by traditional methods anywhere on the Columbia River or in the State of Washington. It is therefore apparent that members of the Yakima Nation will continue to be arrested and harassed by the fish management agencies until a firm pronouncement covering Indian treaty rights is handed down by this court. The interest of the Yakima Nation in the outcome of this case follows as night follows day.

ARGUMENT

There have been many rules regarding Indian fishing at usual and accustomed places discussed in the briefs of petitioner and of The National Congress of American Indians as *amicus curiae*. Before discussing any of such rules, we ask their applicability in the present case. The question as to the State's power to regulate is not before us in the present case or situation. The injunction against petitioners is total and permanent and the State law and regulations also prohibit the taking of one fish by petitioners. This total prohibition against Indians takes place during a time when the fish run is extensively fished offshore and instream by fishermen not exercising Indian treaty rights. Assuming for argument that the State possesses the right to regulate, does this include the right to prohibit? The injunction as enlarged by State law and regulation provisions does not regulate, does not restrict, does not limit Indian treaty fishing. It totally prohibits the exercise of any Indian treaty fishing rights. The State of

Washington has perhaps disguised its long held contention that Indians do not have any rights that are not held by other citizens, but they are in fact before this court with a renewal of the same contention. This position was rejected by this court in *Tulee vs. Washington*, 315 U.S. 681 (1942). It cannot be claimed that total prohibition to fish at usual and accustomed places by the traditional methods was contemplated by the signers of the treaty. Fishing then, as now, was an integral part of the livelihood of the Northwest Indians. If there is to be a restriction on this treaty reservation, Congress should be the one in the exercise of its plenary power to break the United States' word with the Indian people. The states have been unable to sustain their contention regarding conservation before Congress and, therefore, turn to friendly state courts for such action under the guise of the reasonable and necessary rule and findings of fact within this broad pronouncement.

If Indian treaty rights are not to be destroyed in fact this court has two alternatives for its consideration. It can reaffirm that treaty Indians have a right to fish at usual and accustomed places by traditional methods subject only to the restriction that they take no more in amount or percentage of the run than they took at the time of the treaty or it can by guidelines provide what restrictions that are necessary for conservation that the State can impose. From the history of

the problem it is believed that the former alternative can be the only adequate answer. The responsibility would then be where it was at the time of the treaty, on the tribe reserving this right. This is surely what was contemplated by both parties to the treaty at the time of its execution. Nothing before this court in the present case could lead the court to believe that this right would be abused. If it is, Congress in exercising its duty to protect the nation's natural resources could break the treaty and impose any restraints necessary or could delegate this duty to the states for what action they considered necessary for conservation. Doubt that this would be done cannot exist in the minds of any objective observer.

If this court determines that the second alternative was within the contemplation of the makers of the treaty, the rule set forth by the Ninth Circuit Court in interpreting the *Tulee* case in *Maison vs. Confederated Tribes of the Umatilla Reservation*, 314 F.2d 169 (C.A. 9th 1963) most closely follows the intent of the treaty makers and the decisions of this court. In *Tulee* this court after setting forth that state regulation must be "necessary" said:

"... the imposition of license fees is not *indispensable* to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." (Italics ours)

In the holding below the State courts while agreeing

that regulations must be "reasonable and necessary" chose to reject without adequate reason the use of the word "indispensable." This was true even though the *Tulee* decision had used both words in the same light. We cannot understand the rejection of this *indispensable* guideline while accepting the *necessary* guideline. Doesn't "necessary" mean "indispensable"? Lexicographers find the words interchangeable.

The holding of the Supreme Court in this interpretation of a federal treaty is binding on the State courts and the interpretations of the Ninth Circuit Court is entitled to great weight. In spite of this uniform rule, the Washington State Courts have rejected the indispensable test laid down in *Maison vs. Umatilla* without any good reason. This should be corrected.

While we would agree with petitioners that action in State court cannot be brought against a tribe without its consent, we are concerned that the court in its decision may indicate that criminal action to enforce state regulation, without some prior finding by the courts that the regulation is necessary and indispensable, is the proper remedy. This is not so. There are two fundamental principles of criminal law that are applicable in the United States. One is that criminal laws must be certain. Before the State can punish a person for a crime, the law to which that individual is subject must be clear and unmistakable. The person must know, or at least be able to know, before he com-

mits an act whether the act is a crime or not. If it is too vague, then that statute cannot stand. This court has expressed itself on this point in *Connolly vs. General Construction Company*, 269 U.S. 385 (1926), where it said:

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The State of Washington has handled the question of regulation of Indian fishing in terms that are too vague to provide due process. The State, without any hearing, laws or regulations specifically regarding Indian treaty fishing, and with only the general guideline that treaty Indians are subject to State law the same as every other citizen, has in the past brought many criminal actions claiming that it is necessary to conservation to bring Indians at usual and accustomed places in each particular instance within the purview of its general law or regulation. You can readily see the problem confronting the individual Indian fisherman. He runs the chance that the tryer of fact will determine that the State's regulation is necessary—when only last year the tryer of fact may have found just the opposite regarding the same Indian at the same location.

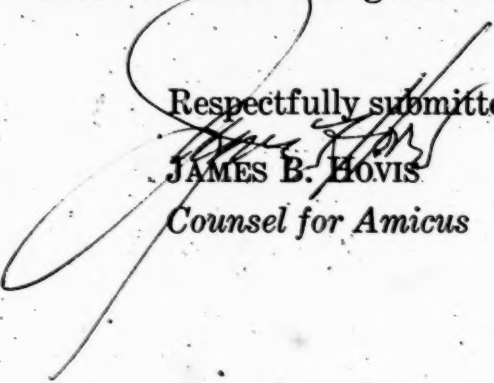
In 1966 a situation existed where tribal governing bodies had enacted ~~tribal~~ conservation regulations that were found to be adequate by the Department of the

Interior and Department of Justice, and where tribal authorities and the United States Government had announced their intent to defend every Indian fishing in conformity with the regulations, that the State still arrested many Indians so fishing and subjected them to unsuccessful criminal prosecution. Perhaps injunctive procedure is not applicable, but it is submitted that criminal prosecution under the facts involved is even less applicable.

CONCLUSION

This court again has before it unreasonable and arbitrary action on the part of a third party—not party to a treaty or promise—to pervert and destroy the intention these two parties did and still have regarding said reserved right. The Yakima Indian Nation has every confidence that this court will not be participant in such improper action. The Executive Branch of the Federal government and Congress has in spite of pressure from the states tried to keep their word in this fishing matter. “Great countries like great men keep their word.”

Respectfully submitted,


JAMES B. HOVIS

Counsel for Amicus

March 1, 1968



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**IN THE
SUPREME COURT**

**OF THE
UNITED STATES**

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

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AND THE

**DEPARTMENT OF FISHERIES OF THE STATE OF WASH-
INGTON,**
Respondents.

**ON WRIT OF CERTIORARI
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STATE OF WASHINGTON**

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

QUESTIONS PRESENTED

- I. Does Article 5 of the Treaty of Medicine Creek Operate As a Reservation of Sovereign Rights or Immunities for the Petitioners From the Application of Valid State Conservation Laws?**
- II. Does the Puyallup Indian Reservation Legally Exist?**

- III. Does An Indian Tribe Possess Immunity From Suit Over Issues Involving Off-Reservation Property Rights?
- IV. Is a Declaratory Judgment Action the Proper Procedure to Test What Rights, If Any, Petitioners Possess?
- V. Does the United States Have Any Authority to Regulate Off-Reservation Indian Fishing?

THE TREATY AND STATUTES INVOLVED

The treaty involved is known as the Treaty of Medicine Creek, 10 Stat. 1132.

The statutes involved are those of the State of Washington concerning fishery resource conservation by regulation of the time, place and manner of fishing. Anadromous fish are the subject matter of this litigation. The conservation or management responsibilities for anadromous fish has been legislatively defined to include all species of salmon as food fish and steelhead trout as game fish¹. State laws most often violated by Indians claiming off-reservation fishing rights are: Revised Code of Washington 75.12.060 (hereinafter referred to as RCW):

"It shall be unlawful to construct, install, use, operate, or maintain within any waters of the state any pound net, round haul net, lampira net, fish trap, fish wheel, scow fish wheel, set net,

¹The Department of Game has management responsibility for steelhead trout and the Department of Fisheries for salmon and shellfish. RCW Titles 75 and 77. Food Fish (i.e., salmon species) may be dealt with commercially while steelhead trout may not. Salmon may be taken with commercial gear (nets) in salt water under regulations promulgated by the Department of Fisheries. Steelhead trout may only be taken by hook and line under regulations promulgated by the Department of Game.

weir, or any fixed appliance for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means."

RCW 75.12.280:

"It shall be unlawful for any person to install, use, operate, or maintain within any waters of the state any monofilament gill net webbing of any description for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means or with such gear."

RCW 77.16.060:

"It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of non-game fish.

"Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment."

STATEMENT OF THE CASE

The State of Washington has an extensive statutory and regulatory system for conserving and perpetuating its fishery resources while at the same time

permitting a maximum utilization by both sport and commercial fisheries. In order to achieve the goal of maximum utilization, the state has gone far beyond mere enactment and promulgation of restrictions on fishing activities, although this is an essential management tool. The state has expended large sums of public monies: (1) to develop natural spawning and rearing areas through stream clearance projects; (2) for construction and operation of many hatcheries, spawning channels and rearing stations; (3) for construction of fish passage facilities over hydroelectric projects, irrigation projects and other obstacles in our river systems; and (4) to establish research staffs of fishery biologists qualified to study and make recommendations concerning problems of the anadromous fishery resource including pollution problems.

For example, both the departments of game and fisheries maintain hatcheries on the Puyallup River system (A. 113, 142) and have, in the past, conducted an extensive planting program on the system (A. 142).

While the salmon are located in salt water, they are subject to efforts by commercial and sport fisheries to reduce them to a captive status. These fishing efforts are conducted along the coasts of Alaska, British Columbia, Washington, Oregon and California by persons of various nationalities. These activities outside national boundaries are conducted under regulations adopted pursuant to international agreements.

Within the territorial limits of Washington state, commercial fishing for salmon is governed as to time, area and gear by state laws and regulations. Those laws and regulations completely prohibit net fisheries in all rivers and streams within the state. The Puyallup River is therefore closed to net fishing. In addition, Commencement Bay, into which the Puyallup River flows, has been designated as a salmon preserve and has been closed by the Department of Fisheries to all commercial net fishing (A. 667).

Prior to 1953, no open net fishery existed in the Puyallup River (R. 459). In that year certain of the petitioners utilized set gill nets near the mouth of the Puyallup River where it empties into Commencement Bay and commercially disposed of salmon which they caught.

A set gill net, commonly referred to as a set net, is a gill net of single web construction which is laid out in the water and is either tied or anchored at both ends of the net, thus holding it in a fixed position. Gill nets are also used in the legal saltwater drift net fishery by commercial fishermen. The nets used in the drift net fishery are regulated as to type of construction, mesh size, length, depth, areas and times where they may be used. The set gill nets, utilized by petitioners, have not been regulated or limited in any of the respects noted above (R. 465-534).

The set net fishing activities of petitioners resulted in criminal charges being filed which culmi-

nated in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957). After the four-four split decision of the Washington Supreme Court in that case, petitioners greatly increased the intensity of their set net fishery in the Puyallup River and Commencement Bay. At all times anadromous fish were migrating to their spawning grounds in the Puyallup River, the petitioners have pursued their commercial fishing activities with both set nets and drift nets on a seven day per week, twenty-four hour per day basis. The fishing gear utilized by petitioners effectively blocked passage of anadromous fish ascending the Puyallup River.

Due to petitioners' intensive and unregulated fishing effort, insufficient numbers of adult spawners have reached the spawning grounds and state hatcheries to perpetuate the runs and races of anadromous fish of the Puyallup River.

Five species of anadromous fish are found in the river; four are salmon (chinooks, silvers, chums and pinks) and one variety of trout (steelhead) (A. 123).

Anadromous fish are those which spawn in fresh water, migrate to salt water to mature and then return to fresh water to start the cycle again. Adult salmon die after spawning, steelhead do not necessarily do so (A. 137).

The fish deposit their eggs in the riverbed gravel in late fall and winter. The eggs remain until they hatch and the young swim up from the gravel. Pink

and chum salmon fry immediately leave the stream and move to the sea (A. 124). Chinook fry remain in the stream for about 60 to 90 days and then move to sea. Silver salmon fry remain in fresh water for one year, then migrate to sea (A. 125). Young steelhead spend about two years in fresh water before they migrate to sea (A. 137).

Each species spends a different length of time in salt water, continuing their growth. Pinks return to the streams to spawn after two years at sea (always in odd-numbered years in Puget Sound); chums return in three or four years; chinook anywhere from two to five years; and silvers remain at sea two or three years (A. 125). Steelhead return after two to four years (A. 137).

Each species of anadromous fish consists of various distinct races (A. 156) segregated according to river system and the time of their return to their natal river from the sea. Each race must be managed independently of each other. For example, the Puyallup River contains several races of chinook and each utilizes a different portion of the stream for spawning (A. 156).

As stated by Dr. Richard Van Cleve, Dean of the College of Fisheries of the University of Washington:

"(T)he escapement has to be very delicately balanced to allow escapement to all parts of each race, because each race consists of what we call in genetics, a gene pool, which is actually the basis for the genetic inheritance of a particular race or particular population." (A. 157, 8)

The basic conservation management theory for regulating fishing effort is to remove fish from the overall population and not completely remove any one race or genetic entity. This allows "a portion for escapement from all parts of this particular, of each particular race." (A. 158)

The term "conservation" does not mean saving fish or preventing all fishing effort,

"It means the development of the runs and speaking particularly with respect to salmon. But it also holds true with respect to all other species too.

"They obtain the maximum catch, that is, the population that each population is capable of producing, and this is the means that we should have maximum utilization of all the facilities and the spawning areas of the salmon." (A. 162)

As the various runs return from their ocean "pasture" to spawn, they are subjected to fishing effort. The basic aim is to regulate that effort so that the resource is harvested in such a way that only a portion of each population is removed (A. 85).

This process was described by the Assistant Director of the Department of Fisheries, J. E. Lasater, as follows:

"Q. Now, I believe on your cross examination you testified that the regulation of the upstream migrants or adult fish, as they began their migration to the stream of origin from the ocean, I believe you said 'more significant' or 'more critical' or something along this line; is that correct?

"A. Yes.

"Q. Could you explain what you meant when you testified that this is of such importance to you as Assistant Director of the Department of Fisheries, and as a biologist?

"A. As the fish come through the fishery, you assess the size of the run in the general area, then you take a look at the regulations that you already have in effect, and judge whether they are going to be sufficient to guarantee a spawning escapement to this stream in general. Then as the run approaches closer to the particular stream, we have the Puget Sound divided into various fishing areas, and if the run to a particular stream, or group of similar streams and area, appears to be lower than the average that we have been looking at, then further restrictions will be placed in the particular areas which will affect those particular streams.

"So that as the fish approaches the stream our knowledge of the precise run to that stream gets better and better, and we can more intelligently and accurately regulate it,—regulate that particular run, as it splits off from the other runs.

"Q. Do you consider it important to have control over any fishing effort which is made upon the stocks at this point in their migration?

"A. It is important if the stream is going to be held near or at its maximum potential production for endless years to come." (A. 89, 90)

It is of vital importance for the protection of the runs that the total fishing effort be controlled. To put it another way, the resource is subject to destruction, if a net fishing effort in Commencement Bay and the Puyallup River is allowed to exist at all, even though there are prohibitions as to time and gear in Puget Sound. It is probable that races

of the total population of the Puyallup will be destroyed if a net fishery is permitted.

Lasater stated:

"Q. In your opinion, Mr. Lasater, is the Indian fishery in the Commencement Bay and Puyallup area a significant cause for the decline of the salmon stocks of the Puyallup River system?

"A. Yes, it is a significant cause.

"Q. Over and above these other mortality factors?

"A. Yes.

"Q. Taking into account, now, these other mortality factors which you have outlined?

"A. Yes."

"Mr. Coniff: If I may have a moment, Your Honor.

"I intend to wind up the redirect examination very shortly.

"Q. I believe in your testimony earlier this morning, in response to a question by counsel, you indicated that in your opinion it was necessary to totally prohibit net fishery, of the Indian net fishery up to the town of Puyallup in the Puyallup River. Could you explain your answer a little further?

"A. Well, I wouldn't limit it to the town of Puyallup. The important factor is that the fish at the mouth of the river, and in Commencement Bay, at that point, whether they are numerous or few, are all that you have to work with to get your spawning stock up the river. And the fish do mill. They are very vulnerable, and if you don't control the fishery absolutely at this point, then all of your other efforts will have been completely in vain. And as the fish do mill, closures aren't effective, it has been our finding in streams throughout the state of similar size, that we have had to shut the net fishery

down completely. And the evidence of the effect of such a fishery can be found in the Annual Report records." (A. 94, 95)

The fish making up the various gene pools or races are milling in the Bay and the lower river at this time and any net fishery subjects these species to a repeated take on the same fish. The effect is drastically different from a net fishery in Puget Sound as the fish are passing through a geographical area and are only subjected to fishing once (A. 101, 102, 103).

A sports or hook and line fishery at this point has no significant effect on the resource because of its inefficiency (A. 96, 97).

Petitions repeatedly point out that they take only 3% to 5% of the total fish catch from the Puyallup River runs (Pet. Br. 8, 11, 13, 14, 21, 22, 23, 28, 30, 32, 33, 35).

The difficulty with this approach is that the fishery takes place in an area that makes it biologically unsound to permit that effort in that place, i. e., a fishery on milling stocks. The same fish are subjected to a net fishery over and over again, as they are not moving out of the area.

The expert biologists, including the three most eminent fishery biologists in the Pacific Northwest (Dr. Van Cleve, Dr. Lauren Donaldson and Dr. J. A. R. Hamilton), uniformly condemned this practice, no matter who utilizes it (A. 101, 128, 130, 132, 133, 142, 161, 164, 176).

The regulatory system relates to all species of anadromous fish and is designed to protect them at all stages of their life cycle (A. 100-103, 137-141). Should one segment of the protective system break down or be rendered ineffective, the whole scheme is rendered useless and the resource endangered (A. 96).

In this case we are faced with an attempt by a certain group to establish an immunity from one segment of the regulatory scheme. Should the attack be successful, the entire conservation program will be destroyed, just as a weak link will destroy the purpose of a chain.

As an example, it has been recorded that a net fishery in the Fraser River, which is much larger than the Puyallup system, is capable of taking 98% of the migrating fish (A. 132).

SUMMARY OF ARGUMENT

I. An Indian Treaty Operates As A Grant of Right From the United States to the Indian Tribe and Therefore the "In Common With All Citizens of the Territory" Phase Must Be Given Literal Effect.

Aboriginal use and occupancy, sometimes referred to as "aboriginal title", does not create a compensable property right in Indians under the Fifth Amendment to the Constitution. Therefore, execution of a treaty with an Indian tribe does not operate as a recognition of any pre-existing right, but is a grant of right from the United States to the tribe.

Johnson v. McIntosh, 21 U.S. 543 (1823); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The right granted by the treaty to "fish in common with all citizens of the Territory" means that treaty Indians are possessed of only such rights as are all other citizens. The premise of *United States v. Winans*, 198 U.S. 371 (1905) that treaty was a recognition of "aboriginal title" is in error to this extent.

This conclusion is supported by the following language which appears in the treaty with the Yakima, 12 Stat. 951, in Article 3:

" * * * is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways."

Absurd results on our streets and highways would obtain if the "in common" language were interpreted as a reservation of pre-existing sovereign right of the Indians as petitioners contend.

II. Assuming Arguendo that Treaty Indians Possess Special Rights to Fish Outside Their Reservation Boundaries, The "Reasonable and Necessary" Test Affords Recognition of Indian Rights and Yet Allows Conservation of the Anadromous Fishing Resource.

The test applied in the opinion below and in *State v. McCoy*, 63 Wn.2d 241, 387 P.2d 942 (1963) is the same rationale used by this court in *Tulee v. Washington*, 315 U.S. 681 (1942).

It allows the state to prohibit certain types of fishing practices when it can show the resource is being endangered by net fishing at critical times in certain areas.

The "indispensability test" of *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) prohibits any conservation until the Indians have taken all but the last fish. It would effectively destroy the economic and recreational value of the resource. This standard is not workable in terms of the conservation needs of the resource because it leaves an Indian commercial fishery, using modern nylon monofilament nets, subject to no meaningful management or control.

III. Petitioners Possess No Immunity From Suit to Determine the Quantum of the Treaty Right.

The State of Washington has title to the fishery resource within its borders for the benefit of the public. Petitioners rely exclusively on cases granting tribal immunity for on-reservation internal tribal activities and they have no application to off-reservation actions that infringe on the state's property rights and governmental control.

IV. The Puyallup Indian Reservation Has Been Removed From Its Indian Country Status Pursuant to an Act of Congress, Thereby Severing the Guardian-Ward Relationship With the Federal Government.

Congress removed the trust status from the land within the original reservation in 1893. 12

Stat. 633. In 1904, Congress confirmed the removal of the alienation restrictions. 33 Stat. 565.

In *United States v. Kopp*, 110 Fed. 160 (D.C. Wash. 1901) the court recognized the land was no longer "Indian country." When reservation lands are sold under Congressional authority, any hunting or fishing rights pursuant to a treaty are terminated. *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (D.C. Ind. 1940).

V. The Declaratory Judgment Procedure Affords the Best Vehicle For Disposition of the Questions Involved.

When there is doubt as to the meaning or applicability of a statute to a particular group or to a certain activity, a declaratory judgment action is best suited to answer complex questions. This court has recommended such a procedure in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Respondents have brought suit in their representative capacity as trustees of the fishery resource to protect public property from destruction. *People v. Monterey Fishing Co.*, 195 Cal. 548, 234 Pac. 398 (1925).

The essential requirement of a declaratory judgment action in an area involving criminal law are present here. This action involves (1) an actual controversy (2), the declaration will settle a substantial controversy and (3), all parties whose rights are affected are before the court.

ARGUMENT

L. An Indian Treaty Operates As A Grant of Right From The United States To The Indian Tribe and Therefore The "In Common With All Citizens of the Territory" Phrase Must Be Given Literal Effect.

The Constitution declares a treaty to be the supreme law of the land. U. S. Const., Art. 6. There is no question that the federal government may limit a state's police power by treaty. *Missouri v. Holland*, 252 U.S. 416 (1920).

Treaties with the various Indian tribes of the United States are distinguishable from international agreements to which the United States is a party because they deal with citizen-nationals wholly within the geographical and jurisdictional limits of the United States. 8 U.S.C. 1401 (a) (1958). The distinction between international agreements and Indian treaties was first drawn by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832) which held that the Indian tribes were *dependent* sovereigns and were not subject to the laws of the United States or of a state within the boundaries of their treaty-created reservations unless expressly made so by Congress.

The federal government has, since 1871, been foreclosed by act of Congress from making new treaties with Indian tribes. 16 Stat. 544, 566; 25 U.S.C. 71. The notion of complete internal sovereignty of Indian tribes has undergone erosion due

to the continuing impact of the dominant Western-European civilization.

Under certain circumstances, state governments have been permitted to assume jurisdiction over Indian reservations for certain purposes. Public Law 280, 67 Stat. 588 (1953); 18 U.S.C. 1162; 28 U.S.C. 1360 (1958).

Indian reservations are something of an anomaly in our system of government. It would appear that they are "federal municipalities". *Wheeler-Howard Act*, 48 Stat. 984 (1934); 25 U.S.C. 461, et seq. The *Wheeler-Howard Act* authorizes the issuance of a constitution to Indians residing on a reservation for purposes of self-government. This same statute also authorizes the formation of business corporations by Indians on a reservation to engage in commercial enterprises. Thus, on any Indian reservation you can find three types of legal entities asserting rights of "self-government". There may exist (1) a municipal government with a constitution and by-laws, (2) a business corporation with a charter and by-laws, or (3) a continued legal entity succeeding to the legal rights of the aboriginal tribe. 65 Dec. of Dept. Int. 483. This court summarized the legal history of the relationship between the Indians and the states in *Village of Kake v. Egan*, 369 U.S. 60, 71-75 (1962). Added to the limitations upon reservation self-government outlined above is the fact that, under certain circumstances, the federal courts have jurisdiction to review tribal court

decisions relating to matters of internal self-government. *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

Granting the "police power" of the *Wheeler-Howard Act* organizations and the "tribe" over the reservation (subject only to the power of Congress to legislate in this area and the possibility of review in federal courts), off-reservation fishing and hunting is a matter extra-territorial. It must, therefore, be grounded in the survival of some *right* guaranteed to the aboriginal tribe or band of Indians whose rights have been succeeded to a presently existing tribe or band of Indians *other* than the municipal corporations or business corporations referred to above.

With this background in mind, the logical starting point in an analysis of the legal significance of Indian treaties is the relationship between the Indians and the federal government *prior to the execution of those treaties*.

At the outset, it must be granted that the Indians did not have the ability to understand the common-law concepts of private property. An Indian's "rights" were communal in nature with all other members of the tribe or band with which he was associated. *Journeycake v. Cherokee Nation*, 28 Ct.Cl. 281, 302 (1893) articulates this concept:

"The distinctive characteristics of communal property is that every member of the community is an owner of it as such. He doesn't take as heir, or purchaser, or grantee; if he dies,

right of property doesn't descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners."

When the United States began to preempt the Indians' aboriginal "use and occupancy" of the North American continent by permitting non-Indian settlement of the land, the question quite naturally arose as to the relative rights of the United States, or its grantees, and the Indians to the soil then aboriginally occupied by the tribes and bands.

Johnson v. McIntosh, 21 U.S. 543, 584 (1823) is the leading opinion of this Court discussing this question.

"* * * Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

"By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'property and territorial rights of the United States,' whose boundaries were fixed in the second article. *By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain passed definitively to these states.* We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great

Britain was before entitled. It has never been doubted, that either the United States; or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." (Emphasis supplied.)

The emphasized language takes on added meaning in light of Chief Justice Marshall's discussion of the patents by the Crown of Great Britain to the American colonies at page 579 of the opinion:

"These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. *A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters.*" (Emphasis supplied.)

By this statement, it is clear that it was this Court's position that the United States succeeded to all of the sovereign or governmental rights of Great Britain over the lands described in the treaty of peace ending the Revolutionary War. Even more significant is the statement that the words conveying only political powers "would never contain words expressly granting the land, the soil and the waters". Therefore, the grantor (Great Britain) must have conveyed to the grantee (the United States) both the governmental and proprietary rights to the lands ceded by the treaty of peace ending the Revolutionary War. It was expressly held that the United States has the power to make grants of soil occupied

by Indians to private individuals and, by patent, to convey clear title in fee simple absolute. This is inconsistent with the notion that the Indian possessed "title" to the lands which they aboriginally occupied which might give them the power to "sell their lands". This concept is clarified in *Johnson v. McIntosh*, *supra*, at pages 587-88:

"The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. *They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest;* and gave also a right to such a degree of sovereignty as to the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence o(f) any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." (Emphasis supplied.)

The conclusion to be reached is that the United States possesses the power to grant to its citizens or any resident all right, title and interest to lands aboriginally occupied by Indian tribes. It is submitted that the Indians had no legal right to be compensated for their aboriginal use and occupancy. They could merely hope that political or moral considerations would lead the United States to grant them title to land. *The aboriginal use and occupancy of the Indian tribes amounts to nothing more than a common-law tenancy at sufferance, where their occupancy is not a technical trespass and, therefore, not adverse to the paramount title vested in the United States.*

Has the doctrine of *Johnson v. McIntosh, supra*, been rejected, modified or affirmed by subsequent judicial construction? *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) expressly adopted Marshall's rationale with the following language:

" * * * (a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy

which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." (page 279)

* * * *

"This leaves unimpaired the rule derived from *Johnson v. McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment." (pages 284-85)

* * * *

"No case in this Court has ever held that taking of Indian title or use ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willing made to allow tribes to recover for wrongs as a matter of grace, not because of legal liability. 60 Stat. 1050." (pages 281-82)

* * * *

"The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." (pages 288-89)

In footnote 21 to its opinion, the Court added: "The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print

No. 12, Supplemental Reports dated January 11, 1954, on H. R. 1921, 83rd Cong., 2d Sess. * * *

From the foregoing, it is clear that a treaty between the United States and Indian tribes could not operate as a recognition or reservation of "aboriginal title".³ Yet, it was precisely this notion that the Court relied upon, with no citation of authority to support its position, in *United States v. Winans*, 198 U.S. 371 (1905) to describe the nature of off-reservation fishing rights at "usual and accustomed" grounds under the Treaty with the Yakama, 12 Stat. 951 (1855).

At page 381, the Court stated:

" * * * In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Based on the assumption that the treaty operated as a reservation of "aboriginal title" the court went on to characterize the off-reservation fishing "right" as an easement at page 384:

" * * * Nor does it (the treaty) restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The language of the Court in the *Winans* case, *supra*, is obviously inconsistent with the fundamental

²The rationale of the *Tee-Hit-Ton* case, *supra*, has been followed by the lower federal courts. *Cowlitz Tribe of Indians v. City of Tacoma*, 253 F.2d 625 (9th Cir., 1957); *Prairie Band of Potawatomi Indians v. United States*, 165 F.Supp. 139 (Ct.Cl. 1958) and *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963).

³At least one commentator disagrees with the rationale of *Tee-Hit-Ton v. United States*, *supra*, and argues the "menagerie theory" of the legal relationship of the Indian tribes to the land. Cohen, *The Legal Conscience*, pp. 273, et seq.

theory of Indian title. *Johnson v. McIntosh*, *supra*; *Tee-Hit-Ton Indians v. United States*, *supra*.

Unfortunately, characterizing the "usual and accustomed" ground provision of the treaties as a common-law easement by the judiciary subsequent to the *Winans* decision, *supra*, has occurred without regard to the fact that its rationale of "original Indian title" has been completely rejected. *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) illustrates the expectable results if the *Winans* doctrine is carried to its logical and ultimate conclusion. In this case, the Umatilla Indians sought a declaratory judgment of their off-reservation fishing rights on the Columbia River and its tributaries and an injunction against the application of state conservation laws and regulations by the Oregon State Game Commission. The Circuit Court of Appeals upheld the issuance of the injunction holding that the state had failed to meet the burden of proving that the application of its conservation laws was "indispensable" to the preservation of the fishery resource. To support this conclusion the court relied on *United States v. Winans*, *supra*, *Tulee v. Washington*, 315 U.S. 681 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). It was the opinion of the court that the Indians "reserved" their aboriginal rights to the fishery resource when they "granted" the lands they aboriginally used and occupied to the United States by execution of a treaty. The only qualification to this theory is that the "citizens of

the Territory" might share in the enjoyment of the resource with the Indians. By placing the Indians in the position of "grantor", the non-Indians must thereby be relegated to the position of mere licensees. The court supported this theory by its interpretation of the dicta in the *Tulee* case, *supra*,

"that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." (315 U.S. at 684)

The court stated at page 172 of the *Umatilla* opinion, *supra*:

"Thus, in both the *Tulee* and *Makah* cases it was held that the Indian's right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."

In order to meet this burden of proof, the state must show that there are no alternative means of preserving the fishery resource. This means that the state would have to show a total closure of both sport and commercial non-Indian fisheries and a continuing decline in the fishery population to such an

⁴Webster's Third International Dictionary, unabridged, 3rd Ed., 1963, defines "indispensable" as follows:

"1. that cannot be set aside or neglected or disregarded; 2. that cannot be dispensed with: that is absolutely necessary or requisite or essential: that cannot be done without."

extent that the very preservation of the resource itself was at stake before it could apply its conservation regulations to a treaty Indian fishing at his "usual and accustomed" fishing grounds. The Indians would be in the advantageous position of having a prior vested right to the entire anadromous fishery resources of the Pacific Northwest because the "usual and accustomed" language is found in all of the Indian treaties executed in the states of Washington, Oregon, and Idaho.⁵ State regulations could only be justified on the basis of protection of Indian fishing.

Tulee v. Washington, *supra*, does not support the position taken by the court in the *Umatilla* decision for two reasons. First, *Tulee* uncritically accepts the rationale of the *Winans* decision contrary to the theory of aboriginal title as held by this Court in *Johnson v. McIntosh*, *supra*, and reaffirmed by this court in *Tee-Hit-Ton Indians v. United States*, *supra*. Second, *Tulee* held that it was not proper for the state to charge an Indian a fee for a fishing license where the revenues so derived were to be used for the general support of state government rather than being related to a conservation program. The

⁵This "usual and accustomed" language, without significant variation, is found in the following treaties: Treaty with the Nisqually et al., Nov. 1854, 10 Stat. 1132; Treaty with D'wamish, Suquamish and other Indians, Jan. 22, 1855, 12 Stat. 927; Treaty with S'Klallam Indians, Jan. 26, 1855, 12 Stat. 1933; Treaty with Makah Indians, Jan. 31, 1855, 12 Stat. 939; Treaty with Walla Walla, Cayuses, and Umatilla Indians, June 9, 1855, 12 Stat. 945; Treaty with Yakima Indians, June 9, 1855, 12 Stat. 951; Treaty with Nez Perce Indians, June 11, 1855, 12 Stat. 957; Treaty with Tribes of Indians of Middle Oregon, June 24, 1855, 12 Stat. 963; Treaty with Quinalt and Quillehute Indians, July 1, 1855, 12 Stat. 971; Treaty with Flathead, Kootnay and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975.

language relied upon by petitioners (necessary for conservation) is merely dicta and certainly unnecessary to the holding of the case.

The adoption of the *Winans* philosophy of original Indian title and the imposition of the burden of proving "indispensability" upon the state by the Ninth Circuit Court of Appeals is directly inconsistent with this Court's decision in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563-64 (1916):

" * * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised.

" * * * We also assume that these Indians are wards of the United States, under the care of an Indian agent, but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the locus in quo. *Ward v. Race Horse*, *supra*; *United States v. Winans*, *supra*."

Ward v. Race Horse, 163 U.S. 504 (1896) likewise upholds the proposition that a state possesses the sovereign or governmental authority to regulate Indian hunting and fishing outside the boundaries of an Indian reservation. Significantly this case was cited

with approval by this Court in *Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962):

"Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

"True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter."

The *Kake* case, *supra*, establishes that the state (1) may apply its conservation laws to Indians who are beneficiaries of a treaty insofar as their off-reservation fishing activities are concerned, and, (2) may apply its conservation laws to Indians who claim special privileges based on aboriginal use and occupancy or "original Indian title".

The burden of proving "indispensability" as articulated by the Ninth Circuit Court of Appeals in

the *Umatilla* case, *supra*, amounts to a presumption that state conservation laws are unconstitutional in their application to the appellants who fish commercially with efficient, modern gear at their "usual and accustomed" grounds with such a devastating effect upon the fishery resource as shown by this record. This notion is not only inconsistent with the cases discussed herein, but also with the fundamental presumption that all state laws are valid so long as they are not constitutionally objectionable. A serious breakdown in law-enforcement has been experienced and may be expected to continue so long as the nature of "original Indian title" is misunderstood. The anadromous fishery resources would be placed in jeopardy.

II. Assuming Arguendo, That Treaty Indians Possess Special Rights to Fish Outside Their Reservation Boundaries, the "Reasonable and Necessary" Test Affords Recognition of Indian Rights and Yet Allows Conservation of the Anadromous Fishery Resource.

Without abandoning what respondents believe to be the proper interpretation of the treaty, we submit that the only workable standard to be applied is that used by the court below if Indians are held to have a qualified immunity from state conservation laws.

The Washington Supreme Court quoted with approval from *Tulee v. Washington*, 315 U.S. 681 (1942):

" * * * The appellant (Tulee), on the other hand, claims that the treaty gives him unrestricted right to fish in the 'usual and accustomed places,' free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

Further, the court quoted with approval from *Organized Village of Kake v. Egan*, 369 U.S. 69 (1960). *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963).

In the instant case and in *Department of Game v. Nugent Kautz*, October Term, 1967, Docket No. 319, the Washington Supreme Court followed the *McCoy* standard.

This concept permits unified management of the resource and yet grants to the Indians a "special right" not accorded to other citizens.⁶

The holding of the Idaho Supreme Court in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953), Cert. denied, 347 U.S. 937 (1954) that a state has no power to regulate off-reservation hunting (and fishing) is demonstrably unsound, as this court has never overruled *Ward v. Race Horse*, 163 U.S. 504

⁶It is interesting to note that two judges of the *McCoy* court would limit the Indian "right" to the use of aboriginal fishing equipment. *State v. McCoy*, 63 Wn.2d 421 at 439 (1963).

(1896) and *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916).

Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963) enunciates an unsound rule from the standpoint of conservation of anadromous fishery resource.

Petitioners make a point of arguing that since unlawful netting activities result in only three to five percent of the total catch of salmon and steelhead, their netting activities should not be prohibited (Pet. Br. 21 et seq.).

The United States makes a similar argument in the brief (Br. *Amicus* of U.S. 10, 11, 12), arguing that on the face of the statistics, a prohibition of net fishing in Commencement Bay and the Puyallup River seems unreasonable.

While such statements seems to have credibility at first blush, they reveal a basic ignorance of the biological facts of life. The unanimous opinions of respondent's expert witnesses was that no net fishing should be permitted in these areas. The reasons for these views are that a net fishing in these particular areas is invidious because the anadromous fish, once having arrived at the mouth of the river cease to move from it. They mill and hold in the bay. A net fishery fishes the same stocks of fish over and over again (A. 94-95). It is unsound for anyone to fish with nets in these areas, be they Indians or

⁷This was recognized by a commentator in Hobbs, "Indian Hunting and Fishing Rights" 32 George Washington L. Rev. 504 (1964).

not. And, fundamentally, this is a decision that must be left to those trained in fishery science, for they alone are equipped by education and experience to make such decisions. There is no conflict in the opinions of the experts. The trial court and the court below were faced with testimony and evidence from the most prominent men in the field that it was reasonable and necessary that all net fishing be prohibited. Petitioners produced not a single witness to challenge respondent's evidence. This Court should rely on the uncontradicted opinions of the witnesses offered by respondents and not substitute its judgment over theirs.

Respondents submit that the evidence shows conclusively that the biological answer to petitioners' and the United States' inquiry "Is not it permissible to allow some net fishing?" is no.

III. Petitioners Possess No Immunity From Suit to Determine the Quantum of the Treaty Right.

Reliance is placed by petitioners upon a line of cases beginning with *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372 (8th Cir. 1895) and culminating with *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957). See also: *Turner v. United States*, 248 U.S. 354 (1919) and *United States v. United Fidelity and Guaranty Co.*, 309 U.S. 506 (1940). (Pet. Br. 48-51.)

Each of the cases cited above involved an attempt to reach property held in trust by the federal government for the benefit of the particular tribe

involved. The courts have indicated that the Indian tribes have a residual "sovereign immunity" from any suit, in law or equity, designed to reach property or property rights possessed by the tribe which is still under the active superintendence of the federal government (i.e., under a trust restriction against alienation). The right of petitioners to claim a vested property right to the anadromous fishery resources and wildlife resources of the State of Washington (outside reservation boundaries) is the very issue of this lawsuit. Respondents assert an ownership in these natural resources for the benefit of the entire public of the State of Washington. *Geer v. Connecticut*, 161 U.S. 519 (1896); *People v. Monterey Fishing Co.*, 195 Cal. 548, 234 Pac. 398 (1925); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); *Village of Kake v. Egan*, 369 U.S. 60 (1962); *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). Respondents assert the right to regulate the fishing of petitioners equally with all other citizens outside presently existing Indian reservation boundaries. It is a matter extra-territorial to areas of federal jurisdiction or superintendence. The *rationale* of this line of cases should not be applied to off-reservation assertions of ownership on the part of Indians or Indian tribes.

Obviously, any person charged criminally with a violation of a state conservation regulation outside reservation boundaries could defend himself by bringing in a "chief" of a "tribe" establishing his

membership therein, and then successfully claim "sovereign immunity" from suit. The term "Indian" or "Indian tribe" possesses no such magic. The cases relied upon by petitioners are distinguishable from the instant case.

IV. The Puyallup Indian Reservation Has Been Removed From Its Indian Country Status Pursuant to an Act of Congress, Thereby Severing the Guardian-Ward Relationship With the Federal Government.

Subsequent to the execution and ratification of the Treaty of Medicine Creek, 10 Stat. 1132, the old Puyallup Indian Reservation was established by executive order. The boundaries were adjusted by President Grant on September 6, 1873, 1 Kappler 922, 923. In 1888 and 1893, Congress granted railroad rights-of-way through the reservation, 25 Stat. 350; 27 Stat. 468. Later in 1893 Congress enacted the Puyallup Allotment Act, 27 Stat. 633, which established a commission to allot the lands of the reservation to the Indians in severalty and placed a ten year trust period from the date of passage of the act (March 3, 1893), during which time the allottees would not have the power to alienate their individual tracts. In 1897 Congress provided that a commissioner be appointed to superintend the sale of allotments within the boundaries of the Puyallup Indian Reservation and to carry out the purposes of the Puyallup Allotment Act, 30 Stat. 87. A question arose concerning the power of the Indian allottees of the Puyallup Reservation to convey complete fee

simple title to their allotted lands. Congress then confirmed the removal of the trust restrictions against alienation of the allotted lands by enacting 33 Stat. 565 (1904). This act reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive proof of Congressional intent to remove the old Puyallup Reservation from its status as "Indian Country" is shown by House Committee Report No. 301, 58th Congress, Second Session (1904). The report states, in relevant part:

This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely as any other person may sell and convey real estate. (p. 1)

Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned. (p. 5)

The state of Washington accepted absolute and complete jurisdiction over the lands in question. RCW 64.20.010, et seq. Both state and federal courts have given effect to the legislation set forth above. In *United States v. Kopp*, 110 Fed. 160 (D.C. Wash. 1901), the court dismissed a federal charge against the defendant for selling liquor to a Puyallup Indian. The court distinguished the earlier case of *Eells v. Ross*, 64 Fed. 417 (9th Cir. 1894) and held:

* * * Since the decision of the circuit court of appeals in that case the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and *I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes.* * * * (Emphasis supplied.) (at p. 165)

The state may tax the lands situated within the boundaries of the old Puyallup Indian Reservation. *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295 (1905). Also, the "Ten Major Crimes Act" (23 Stat. 385) no longer applies to these lands. *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). Accord: 27 Am. Jur., Indians, § 36. The lands in question are no longer set aside for the use of the petitioners, as Indians, and are no longer under the active superin-

tendence of the federal government. The old Puyallup Indian Reservation does not occupy the status of "Indian Country". *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914) and *Healing v. Jones*, 210 F. Supp. 125 (D.C. Ariz. 1962).

All vestiges of federal jurisdiction have vanished.

Where reservation lands are sold pursuant to an act of Congress, as in this case, there are no "retained" hunting or fishing rights by virtue of a treaty. *United States ex rel. Marks v. Brooks*, 32 F. Supp. 422 (D.C. Ind. 1940) held that the guardian-ward relationship between the federal government and the Miami Tribe of Indians had been severed by virtue of the allotment and sale of the reservation lands. Even though the Treaty of Greenville, 7 Stat. 49 (1795) reserved hunting rights to the Miami Tribe, the court held that Congress had terminated hunting rights by virtue of the sale of reservation lands—even though the hunting provision of the treaty was not expressly dealt with in the termination act.

Klamath and Modoc Tribes v. Maison, 338 F. 2d 620 (9th Cir. 1964) rejected the argument that the Klamath Termination Act, 25 U.S.C. 564—564w, did not terminate "treaty-reserved" hunting or fishing rights within the old Klamath Reservation boundaries. The court stated at page 623 of its opinion:

* * * By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, *supra*, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.

State v. Sanapaw, 21 Wis. 2d 377, 124 N.W. 2d 41 (1963) similarly construed the *Menominee Termination Act*, 25 U.S.C. 891-902. See also: *State v. Big Sheep*, 243 Pac. 1067 (Mont. 1926).

In the *Klamath* and *Sanapaw* cases, *supra*, reliance was placed on House Concurrent Resolution 108, 83rd Congress, 1st Session, which states, in relevant part:

Whereas, it is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas, the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens * * *

The Senate Committee on Interior and Insular Affairs, Executive Report No. 1, 89th Congress, 2nd Session (April 8, 1966) severely chastised the Department of Interior, and particularly the Bureau of Indian Affairs, for the failure of these govern-

mental agencies to implement the will of Congress that the American Indian take his rightful place, as a responsible citizen, in our society.

It is submitted that this court should interpret the Puyallup termination legislation in a manner consistent with the intent of Congress as the courts in the *Klamath* and *Sanapaw* cases, *supra*, have done. The umbilical cord between the federal government and these petitioners has been legally severed.

V. The Declaratory Judgment Procedure Affords the Best Vehicle For Disposition of the Questions Involved.

This action was commenced pursuant to the Uniform Declaratory Judgments Act, Chapter 7.24 RCW. The trial court's jurisdiction was founded on RCW 7.24.010:

"Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and such declarations shall have the force and effect of a final judgment or decree."

This form of action was utilized to avoid a multiplicity of criminal actions and their attendant problems of arrest in solving a complex question. As the court below pointed out, criminal prosecutions,

" * * * seems to us the unnecessarily hard way of determining whether they have immu-

nuity from certain fishing regulations." (A. 41)

Further, the court said:

"Since the Indians who claim immunity from these regulations claim them under the treaties between the United States and various Indian tribes, it seems to us that the state departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act." (A. 41)

It is now accepted that a declaratory judgment action will lie in cases involving criminal matters if: (1), there is present an actual and justiciable controversy; (2), the case is one in which the declaration will settle the question and terminate the controversy; and (3), all the parties whose rights are affected are before the court. 10 ALR 3d 733.

Those criteria are met in this case where: (1), the petitioners had been fishing openly in violation of state conservation laws for ten years (A. 35) and respondents are charged with enforcing those self-same statutes; (2), the complaint specifically seeks a declaration of the immunity, if any, petitioners have from valid conservation laws (A. 6); and (3), those claiming special immunities and the agencies with the responsibility for protecting the anadromous fishery resource are the parties to the action (A. 5, 6, 9, 10).

This Court has suggested the procedure enlisted here. See *Dombrowski v. Pfister*, 380 U.S. 479 at 491 (1965) wherein it was suggested that Louisiana officials might overcome a vagueness at-

tack on a statute by seeking a declaratory judgment as to its construction (implicit, of course, would be its application to the litigants therein).

This Court stated:

"These are circumstances under which courts properly make exceptions to the general rule that equity will not interfere with the criminal processes, by entertaining actions for injunction or declaratory relief in advance of criminal prosecution. *Zemel v. Rusk*, 381 U.S. 1 at 19 (1965)."

The judgment in this action does not enjoin the commission of a crime itself, but declares that petitioners must abide by the reasonable and necessary conservation laws, rules and regulations (A. 38, 54).

—The evidentiary background in this case shows that unless enjoined, petitioners' activities would destroy the anadromous fishery resource in the Puyallup River.

Title to and the property in all fish within the waters of the state are vested in the State of Washington and held by it in trust for the people of the state. *Geer v. Connecticut*, 161 U.S. 519 (1896).

People v. Monterey Fishing Co., 195 Cal. 548, 234 Pac. 398 (1925) presents an identical fact pattern to the instant case. It involved an injunctive action brought by California on behalf of its citizens to protect the sardine fishery from an unlawful depletion by the defendants. The court held that an injunction should issue in order to protect the fishery resource for future generations and, further,

specifically found that enforcement of criminal statutes would not provide an adequate remedy at law.

"The circumstance that it may be prosecuted criminally for a violation of the penal provisions of the statute affords no adequate remedy for the civil wrong, which consists of an invasion of plaintiff's property." (p. 405.)

VI. The United States Has No Authority to Regulate Off-Reservation Indian Fishing.

The argument made by the United States (*Amicus* Br. 10) off-reservation Indian fisheries are subject to the regulatory authority of the Department of Interior is spurious.

The position taken in the brief currently before this court articulates a proposition of law which is demonstrably untenable. The position taken has proven to be historically attractive to the Department of Interior insofar as it would expand its jurisdiction (i.e., regulatory authority) of the Bureau of Indian Affairs.

The notion that the Secretary of Interior (Bureau of Indian Affairs) possesses the authority to regulate off-reservation Indian fishing and hunting activities in derogation of an exercise of the state police power to protect its own natural resources (*Geer v. Connecticut*, 161 U.S. 519 (1896)), was first rejected by the United States Supreme Court in *Ward v. Race Horse*, 163 U.S. 504 (1896). This same contention was again presented to the Supreme Court in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). In rejecting the argument ad-

vanced on behalf of the federal government, the court stated at page 563:

* * * We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

A comparable argument was raised on behalf of the Bureau of Indian Affairs in *Mason v. Sams*, 5 F. 2d 255 (D.C. Wash. 1925). In this case the Department of Justice advanced the proposition that the federal government could regulate on-reservation fishing activities by members of the Quinault Tribe of Indians. The court rejected this contention.

United States v. Cutler, 37 F. Supp. 724 (D.C. Ida. 1941), held that the Department of Interior could not enforce its regulations adopted pursuant to the Migratory Bird Treaty, 16 U.S.C. 703, et seq., to an Indian hunting within the boundaries of a duly constituted Indian reservation.

Again, as late as 1962, we find the federal government asserting that the Department of Interior possesses regulatory authority to control Indian fishing without an act of Congress authorizing it to do so. In *Village of Kake v. Egan*, 369 U.S. 60 (1962), it was again asserted in the briefs filed on behalf of the federal government that Section 4 of the Alaska Statehood Act, 72 Stat. 339, should be interpreted

to mean that the reservation of jurisdiction over Indian property (including fishing rights) thereby ousted the state of Alaska from its jurisdiction to regulate fishing by aborigines within its boundaries. This Court again rejected the argument advanced by the federal government and commented at page 64:

The United States wisely abandoned its position that Alaska has disclaimed the power to legislate with respect to any fishing activities of Indians in the State. * * *

John A. Carver, Jr., Undersecretary of the Department of Interior, promulgated the proposed regulations of the Department of Interior, Bureau of Indian Affairs, pertaining to off-reservation treaty fishing on July 5, 1965. *It is interesting to note that Mr. John A. Carver, Jr., stated to the Senate Committee on Interior and Insular Affairs on August 5, 1964, that the Department of Interior, Bureau of Indian Affairs, did not possess the authority to regulate off-reservation Indian fishing absent Congressional action.* Hearings before the Subcommittee on Indian Affairs of the Comm. on Interior and Insular Affairs. U. S. Senate, 88th Congress, 2d Session, S.J. Res. 170 and S. J. Res. 171, August 5-6, 1964.

The federal government can point to no statute which would permit it to invade this area of historic state police power activity. Without such Congressional action, the Department of Interior, Bureau of Indian Affairs, cannot claim jurisdiction authority over Indians outside Indian reservations

SUMMARY

Respondents submit that the Treaty of Medicine Creek should be interpreted in the light of its historical context. In 1855 the Indian of Puget Sound occupied an inferior legal status. He was not a citizen. He could not vote. He could not sue or be sued in court of law without Congressional action (e.g., 25 Stat. 350; 27 Stat. 468). To put it bluntly, in 1855 Puget Sound Indians could be legally discriminated against. Respondents submit that the "usual and accustomed" provision of the Treaty of Medicine Creek should be read in its entirety in light of its historical context. The treaty provision in question provides that the Indians shall have a right to fish and hunt in their usual and accustomed areas "in common with the citizens of the Territory". Respondents submit that the "in common" language of the treaty was meant to assure that the Indians would not be foreclosed from their customary sources of food during the transitional period in which they would become civilized beings. It was hoped by Congress that the Indians would be integrated into the agrarian level of economy within twenty to thirty years of the date of execution of the treaty. Unfortunately, for the Indian, this has not occurred.

The same reasoning applies with greater force when Article 3 of the Treaty with the Yakima is considered. The right to go upon the public highways "in common with citizens of the United States" cer-

tainly could not be interpreted to give the Yakima Indians a right to disregard traffic regulations which, of course, were not considered by anyone in 1855. What was intended was that the Indians were not to be discriminated against in their use of public highways.

The same "in common" language of the treaties also refers to gathering roots and berries. Surely it was not intended that Indians possess a treaty right to go upon farms outside their reservations to gather roots and berries in violation of state laws.

CONCLUSION

Respondents submit that petitioners are not legally entitled to immunity from valid state conservation laws and regulations outside reservation boundaries.

Alternatively, respondents submit that the "reasonable and necessary" standard adopted by the court below affords the Indians a special right and yet gives the fishery resource a means of being protected and preserved from destructive fishing practices.

The injunction issued by the lower court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

Nos. 247 AND 319
OCTOBER TERM, 1967

THE PUYALLUP TRIBE,

Petitioner,

v.

DEPARTMENT OF GAME of the
STATE OF WASHINGTON, et al.

NUGENT KAUTZ, et al.,

Petitioners,

v.

DEPARTMENT OF GAME of the
STATE OF WASHINGTON, et al.

*On Petitions for Writs of Certiorari to the Supreme
Court of the State of Washington*

MEMORANDUM FOR THE STATE OF OREGON AS AMICUS CURIAE

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**MEMORANDUM FOR THE STATE OF OREGON
AS AMICUS CURIAE**

STATEMENT OF INTEREST

The State of Oregon, through its Fish Commission of Oregon and State Game Commission, appearing by its Attorney General, pursuant to rule 42, submits that the causes before the court in the consolidated cases have major importance to the State of Oregon as well as to the parties to the suit.

The Columbia River forms a common boundary between the states of Oregon and Washington for a distance of almost 300 miles between the Pacific Ocean to a point near the mouth of the Snake River. Pursuant to the Oregon-Washington Columbia River Fish Compact, ratified by Congress April 8, 1918, 40 Stat. 515, the two states jointly regulate commercial fishing throughout the portion of the Columbia River which forms the boundary between the states.

Thus Oregon has the same concern over the management of the fish resources in this river as does the State of Washington.

Along the Columbia River, through this jointly managed area, are the usual and accustomed fishing stations of members of the several Indian tribes, the Yakimas, the Warm Springs, the Umatillas and under somewhat clouded claims, the Nez Perce, all of which are being utilized by members of these tribes.

Language in each of the treaties* made with these tribes is substantially identical to that in the treaties with the tribes involved in the cases before the court. And as noted in the Memorandum for the United States as Amicus Curiae, p. 2, the same question involved here arises with respect to a dozen other Indian tribes under substantially identical provisions in other treaties.

The Indian fishery on the Columbia River and

* Treaty with the Yakima, 12 Stat. 951; Treaty of Walla Walla, 12 Stat. 945; Treaty of Wasco, 12 Stat. 963; and Treaty with the Nez Perce, 12 Stat. 957.

other Pacific Northwest streams is virtually unregulated and has increased twenty-fold during the past decade. The result is that escapement of mature reproductive stock is threatened and without protection of the escapement, the entire fishery resource of the Columbia River and other Pacific Northwest streams is in imminent danger of destruction.

Because the Indian fishery is virtually unregulated, the involved conservation agencies have no control over the "off-reservation" Indian fishery. Thus the size of its catch is unpredictable, resulting in an appreciable impact upon the necessary escapement of productive stocks of fish and in some cases the virtual annihilation of the brood stock.

Attempts by the Indians to regulate their fishery have ended in failure and the destruction of anadromous fish runs. *The 74th Annual Report of the Washington State Department of Fisheries, 1964*, noted at page 52 the status of the Yakima River, which runs through the Yakima Indian Reservation in south-central Washington:

"This very efficient fishery took an estimated 3,191 spring chinook which represents approximately 97% of the total run into the Yakima River System. The Roza Dam fish counts indicated only 33 spring chinook escaped into the upper Yakima River, the lowest escapement since counting started in 1940. Spawning ground surveys on the Naches River and tributaries revealed an escapement into this system of approximately 75 chinook.

"This was the third successive year that the Indian fishery has virtually exterminated the spring chinook run. In 1962 and 1963 the fishery took approximately 82% and 90% of the runs, respectively. Next season, 1965, marks the final year that this fishery will take an appreciable catch as the four year cycle will then be completed and returns from the low escapements are anticipated to be negligible."

Dr. Lauren R. Donaldson, Professor of Fisheries at the University of Washington and Director of the University Laboratory of Radiation and Biology, testified at the trial that he knew of unregulated net fisheries, similar to appellants, in other rivers and that they had exterminated the runs of anadromous fish (St. Vol. 1, 85-91).

The Federal government has conceded that Indians claiming treaty rights to fish commercially in violation of state conservation laws can destroy the fishery and that Indian self-regulation has failed. The following quotation is from an address on Indian treaty fishing rights prepared for the National Congress of American Indians convention Oct. 3, 1967, at Portland, Oregon, by George D. Dysart, Assistant Regional Solicitor, U. S. Department of Interior:

"... Indian fishermen, particularly Indian commercial fishermen, can seriously imperil or even destroy fish runs if they are not subject to some restraint. The biggest threat, of course, comes from large-scale commercial ~~fishing~~ operations. Many Indians today, like their white

counterparts, use large, modern nets and fish for the general commercial market. Indian fishing practices are not limited to fish that can be taken by an individual Indian personally manning a small hand-operated dip or bag net, nor to fish taken solely for Indian consumption, nor to fish taken for limited local fresh fish markets. Built-in limitations or restraints formerly imposed by early technological limits on the fishing methods and gear, the limited size of the Indian economy, tribal customs and practices, or obedience to tribal elders *are no longer effective as restrictions on the size of the Indian catch. These former restraints must be replaced by new governmental restrictions if the dwindling fish runs are not to be seriously imperiled.*

"Furthermore, changes brought about by increased population in the area, increased pollution or obstruction of rivers, destruction of spawning areas, and other environmental changes affecting fish habitats have considerably diminished fish runs and have made restrictive regulations on fishing practices an absolute must if this resource is to be conserved for the future. Unless all parties cooperate in a conservation program, the Pacific Northwest salmon and steelhead can well end up in the position comparable to the buffalo—a species preserved in limited areas under stringent control in order to prevent its extinction." (emphasis supplied)

Mr. Dysart concedes that only the state fish conservation agencies have the authority and technical and scientific background to regulate the fishery:

"At the present time virtually the only such agencies in existence that have both the authority to prescribe directly enforceable binding regulations and the full range of technical and scientific knowledge to prescribe suitable regulations are the state fish and game management agencies."

Mr. Dysart concedes "serious shortcomings" regarding the authority, if any, of Indian tribes to regulate off-reservation Indian fishing, and their lack of technical and scientific knowledge to regulate the fishery:

"Despite serious shortcomings in their authority to police or control the off-reservation conduct of their members, and despite serious lack of research facilities and scientific expertise, several tribes have made commendable efforts to limit the manner in which their members may exercise these tribal rights. . . ."

The efforts are commendable, but the experience of the Fish Commission of Oregon over the years it has attempted to cooperate with the Yakima Indians is that the effort was a failure because the Indians lack the will and the legal authority to regulate themselves.

This lack of legal authority to regulate off-reservation Indian fishing is not changed by the regulations issued by the Secretary of the Interior purporting to authorize the Federal government to regulate a resource owned by the states, Memorandum for the United States as Amicus Curiae, p. 10.

The Department of Interior cites as authority for 25 C.F.R., Part 256, 25 U.S.C. §§ 2 and 9, and 5 U.S.C. § 301, the latter of which authorizes adoption of regulations. Speaking of 25 U.S.C. §§ 2 and 9, this Court said in *Kake v. Egan*, 369 U.S. 60, 63:

“... the Interior Department itself is of the opinion that the sole authority conferred by the first of these is that to implement specific laws, and by the second that over relations between the United States and the Indians—*not a general power to make rules governing Indian conduct.* ...” (emphasis supplied)

Moreover, the Department of the Interior advised the Senate Committee on Interior and Insular Affairs that Federal regulation would require legislation by the Congress because the government did not possess authority to regulate off-reservation Indian fishing.

John A. Carver, Jr., now Undersecretary of Interior, introduced Lewis A. Sigler as his “constitutional lawyer” at the committee’s hearing on Indian Fishing Rights. The following exchange took place:

“SENATOR JACKSON: What about any possible regulation by the Federal Government of off-reservation fishing on the part of the Indians?”

“MR. CARVER: I am sure the Congress would have the authority to direct the Secretary of the Interior to do it off reservation or on reservation.

“SENATOR JACKSON: But do you present-

ly have that authority or would you need legislation? Mr. Sigler?

"MR. SIGLER: As far as I am aware, we do not have any authority now to regulate off-reservation Indian fishing.

"SENATOR JACKSON: But on-reservation fishing?

"MR. SIGLER: I think not even there. The tribes themselves have that authority.

"SENATOR JACKSON: . . . In any event, Federal regulation could require, in your judgment, legislation by the Congress?

"MR. SIGLER: Yes, sir."

INDIAN FISHING RIGHTS. Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, 88th Congress, Second Session, on S. J. Res. 170 and S. J. Res. 171, Joint Resolutions Regarding Indian Fishing Rights, August 5 and 6, 1964, pp. 15-16.

Similarly, *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925) held that the Secretary of Interior was without authority to make regulations interfering with the common right of tribal members to fish on the Quinaielt Reservation. *United States v. Cutler*, 37 F. Supp. 724, 725 (E.D. Idaho 1941) held:

" . . . the Indians reserved the right to hunt all kinds of birds at any time and in any manner, and no limitation or restriction can, after the adoption of the treaty, be imposed by the United States as to when and what kind of birds the In-

dians may kill upon the reservation." (emphasis supplied)

The above decisions confirm that the Department of Interior cannot regulate hunting and fishing by Indians either on or off an Indian reservation. However, 25 C.F.R. Part 256, § 256.6, relating to enforcement and penalties, purports to grant jurisdiction to a Court of Indian Offenses or a Court of Indian Fishing Offenses "without regard to any territorial limitations otherwise applicable to the jurisdiction of such court."

Indian courts are, at best, courts of limited jurisdiction confined to the territory of their respective reservations. To purport to grant such courts extra-territorial jurisdiction, as has been done by the Department of Interior, raises major constitutional questions.

The extra-territorial court issue and the above decisions are cited to establish that the Department of Interior and the affected Indian tribes do *not* possess authority to regulate off-reservation fishing by treaty Indians.

A decision that the states cannot regulate Indian fishing means that there will be no effective conservation of the resource because the Department of Interior and the treaty Indians lack authority to regulate off-reservation Indian fishing.

Thus the decision rendered in the cases before the court will have a decisive impact upon the ability of

the State of Oregon to manage and conserve the Columbia River fishery where subject to Indian fishing claims.

QUESTION PRESENTED

Whether Indians exercising rights guaranteed pursuant to treaty with the United States to fish at their usual and accustomed stations outside their reservation are subject to state conservation regulations.

ARGUMENT

I

The State of Washington was admitted into the Union on an equal footing with the other states, consequently it possesses the same ownership and control over its fish resource as the other states.

This is the doctrine of *Ward v. Race Horse*, 163 U.S. 504, 511:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. *But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely*

declaratory of the general rule." (Emphasis supplied)

At 163 U.S. 515-516 the court said:

"Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. But the argument goes further than this, since it insists that although by the treaty the hunting privilege was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue although the United States parted with its entire authority over the capture and killing of game.

"... this case involves a question of whether where no reservation exists a State can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States. . . ."

The *Ward v. Race Horse* rule has been followed by this court in *Kennedy v. Becker*, 241 U.S. 556 (1916). The court said at 241 U.S. 563-564:

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful — when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to the necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States

and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): 'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.' "

The doctrine that an Indian treaty and Indian fishing rights are subject to state sovereignty has been followed by this court in *Village of Kake v. Egan*, 369 U.S. 60, 75 (1962):

"... even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681"

Thus treaty Indians are subject to the same state conservation laws as anyone else, except that they have a right of access to their fishing stations, and under the Tulee rule cannot be taxed for exercising the privilege of fishing.

II

The United States and the State of Oregon agree on the principle that Indian treaty fishing rights are subject to regulation to preserve the resource.

The Memorandum for the United States as Amicus Curiae states at page 8:

"... Indian fishing pursuant to a treaty can be limited, but only to preserve the resource;"

In accordance with that principle the United States did not hesitate to adopt regulations it regarded as necessary to preserve the Pacific Ocean halibut fishery. The Makah Tribe of Washington, which engaged in the halibut fishery, sued to recover damages for alleged deprivation of the fishing rights reserved to them under article 4 of their 1855 treaty (12 Stat. 939) with the United States.

The Court of Claims held that the government's regulations restricting the rights of the Makah Indians to fish for halibut did not amount to a breach of the treaty. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477 (1959); affirmed 151 Ct. Cl. Rep. 701 (1960); cert. den. 365 U.S. 879 (1961).

The United States recognizes that regulation in the interest of conserving the resource takes precedence over any claim of Indians to unrestricted fishing. As stated in Memorandum for the United States as Amicus Curiae at p. 7:

"... If the treaty rights of the Indians are so paramount as to be wholly beyond any regulation, then, hypothetically, the Indians are free to destroy the fishery by excessive fishing. Not only would that be a harsh result, but *it seems inconsistent with the non-exclusive character of the rights guaranteed*. . . ." (emphasis supplied)

This means that to recognize an unrestricted authority of the Indians to fish in defiance of state conservation regulations is to allow the Indians more than the treaty granted. And that grant was of a *non-exclusive* use of the fishery in common with the citizens of the territory.

The non-exclusive use of the fishery must be examined in context with the effect of a decision restricting the authority of a state to regulate fishing for conservation purposes.

Any court-imposed restriction on state authority throws into the courts the technical question of what is "reasonable" or what is "indispensable." As a practical matter the courts cannot make the day-to-day technical decisions as to whether a particular regulation with an effect on Indian fishing is reasonable.

This fact of life is recognized by Mr. George D. Dysart, Assistant Regional Solicitor, in his October 3, 1967 address prepared for the National Congress of American Indians Convention:

"No court can adequately prescribe the precise and detailed rules and limitations applicable to Indian treaty fishing. This is a function for a regulatory body, preferably one able to prescribe and modify its restrictions on short notice to deal with constantly changing conditions.

"At the present time virtually the only such agencies in existence that have both the authority to prescribe directly enforceable binding regulations and the full range of technical knowledge and data to prescribe suitable regulations are the state fish and game management agencies."

Moreover, assuming *arguendo* that the courts and not the conservation agencies are to regulate Indian fishery, the resource would be destroyed pending disposition of the technical, time-consuming litigation.

III

The United States recognizes that the treaty can be interpreted as a Civil Rights-type agreement that the states would not discriminate against the Indians on the ground of race.

The United States in its Memorandum as Amicus Curiae at p. 3 states:

"Indeed, if the only guarantee to the Indians was freedom from discrimination in their fishing at the specified locations, the treaty has no effect today, since Indians, as citizens subject to State jurisdiction when off their reservation, are presumably entitled to equal protection anyway. . . ."

The above-quoted position ignores the fact that Indians at the time of the treaty were not considered citizens and the long, sordid history, up to and after 1859, of discrimination against Indians.

This court has recognized that Indian land ownership was limited to their reservations, in permitting Indians access to the fishing grounds over land in private ownership. *Seufert v. United States*, 249 U.S. 194. To have held otherwise would have been to grant a right without a means of exercising that right. The same rationale applies to the holding in *Tulee v. Washington*, 315 U.S. 681. Exercise of a right cannot be conditioned on payment of a tax. This principle has been used to strike down payment of a poll tax as a condition of voting in a federal election.

IV

The several states have authority and jurisdiction to regulate Indian treaty fishing in areas outside established reservations. *Ward v. Race Horse*, 163 U.S. 504; *United States v. Wirans*, 198 U.S. 371; *Kennedy v. Becker*, 241 U.S. 556; *Tulee v. Washington*, 315 U.S. 681 and *Kake v. Egan*, 369 U.S. 60. The states recognize, however, that no power exists to regulate fishing within the boundaries of established Indian reservations. Here, it must be emphasized, the issue is fishing outside of a reservation.

Although it would appear that this court has stated clearly that the states can regulate off-reservation Indian fishing, lower court decisions have obscured the principle of state regulation. Contra to the decisions of this court are refinements of the rule enunciated by the 9th Circuit Court of Appeals in *Makah Indian Tribe v. Schoettler*, 192 F.2d 244; *Maison v. Umatilla*, 314 F.2d 169. In addition, there is the Idaho decision, *State v. Arthur*, 74 Id. 251, 261 P.2d 135.

The rules enunciated in the U. S. Supreme Court decisions and the 9th Circuit decisions cannot be reconciled. The effect of the 9th Circuit decisions is to render an exercise in futility the good faith attempts of the states to regulate fishing for the conservation of the resource for the benefit of all citizens, including Indians.

In addition, the 9th Circuit decisions ignore that the resource in question, fish, is one owned by the

state as trustee for the people of the state. *Geer v. Connecticut*, 161 U.S. 519 (1896), and that the regulatory power over such resource has been held by this court to lie with the states, even where off-reservation hunting and fishing rights have been preserved by federal treaties. *Kake v. Egan*, 369 U.S. 60, 75-76.

As long ago as 1905 the United States through its Solicitor General recognized that the states control their fisheries. The Solicitor General was quoted in *United States v. Winans*, 198 U.S. 371, 373, as follows:

"... The States control navigable waters, including the soil under them and the fisheries within their limits, subject only to the rights of the Government under the Constitution in the regulation of commerce. ..."

We believe that the rationale adopted in *Maison v. Umatilla*, supra, cannot be sustained in law or in practice. The *Maison v. Umatilla* decision appears to have its basis in the language of the *Tulee* case in which the court pointed out that the requirement for a fishing license was not indispensable to the effectiveness of a state conservation program. From this language the 9th Circuit resolved that a regulation must be indispensable and so ruled. Such a finding was not required by the 9th Circuit since the *Tulee* decision said that "it is clear that the regulatory purpose could be accomplished otherwise." (Emphasis added)

The result of the 9th Circuit decision was that

the State of Oregon was enjoined by an order of the U. S. District Court for the District of Oregon in a subsequent proceeding from interfering with Indians fishing in a fish ladder on a dam in the Umatilla River *outside* the reservation (see Appendix "A"). The result of the subsequent decision is to effectively block all migration of fish within the particular river at the whim of the Indians and thus to destroy the fishery.

If the power to regulate off-reservation fishing is found not to reside in the states, what then, are the alternatives? Is regulation of off-reservation fishing to be by the Indian tribes, or, as is proposed by the Secretary of the Interior, by the agency he heads? As noted, *supra*, regulation by the Indian tribes is no regulation since the tribal government has no jurisdiction over the off-reservation conduct of its members and the federal government has no authority to grant the Indians such jurisdiction. It is significant that the Department of the Interior has studiously avoided the question of whether it has any right by regulation to interfere with a state's control of a state owned resource, fish, outside of an Indian reservation.

It is abundantly clear that the Secretary of the Interior has no authority to issue rules or to authorize Indian tribes to issue rules purporting to regulate the harvest of wildlife outside of Indian reservations. The case of *Missouri v. Holland*, 252 U.S. 416, enunciates the rule that such power is possessed only by the several states.

The Secretary of the Interior has authority over migratory birds because in *Missouri* this court ruled that the treaty making power contained in the Constitution of the United States is superior to the Eleventh amendment to the Constitution and to the Constitutions and laws of the states.

The secretary's regulation, 25 C.F.R., part 256, purports to establish conservation goals based on the proprietary right of Indian tribes to a share of the state-owned fishery resource.

This court, in *Tee-Hit-Ton v. U. S.*, 348 U.S. 272, adopted the opinion of Justice Marshall in *Johnson v. McIntosh*, 21 U.S. 543, to the effect that the American Indian has no title recognizable in law to the lands of the United States or any appurtenances to the lands. We feel that this is the better and more workable rule to follow and leaves the states' ownership of the wildlife intact subject to the prohibition against discrimination.

If, as is claimed, Indians have treaty rights which may be disturbed by application in this case of the rule of *Tee-Hit-Ton*, supra, the responsibility for granting gratuities for any compensation of Indian claims should be shouldered by the Congress.

CONCLUSION

There are three ways that this court can rule in this case:

1. The court can be consistent with its past rulings and hold that the states have power to regulate off-reservation fishing by Treaty Indians.
2. The court can rule that the states have no power to control off-reservation fishing by Treaty Indians.
3. The court can rule that the state has limited power to regulate such Indian fishing.

It is our position that the first alternative is the better rule. Besides being consistent, it is workable, it is understandable, and it will permit the state to manage its fishery resource in perpetuity for the benefit of all citizens, including the Indian citizen.

This court has continued to follow the principle that the states may regulate off-reservation hunting and fishing of treaty Indians. As stated in *Kake v. Egan*, 369 U.S. 60, 75:

"... Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681...."

This court held in *Tulee v. Washington*, (1942), 315 U.S. 681, that the Indian could *not* be taxed for exercising the privilege, but this court has never held that the privilege could not be regulated for purposes of conservation.

It is common knowledge that the nation's wildlife resources are threatened with diminution, if not actual extinction, from the inexorable pressures brought on by the effects of civilization. The time has passed when any one segment of society, be it industrialist, agriculturalist, fisherman or Indian, can conduct his activities without restriction or control if we are to preserve our natural wealth.

Therefore, the State of Oregon believes that if this resource which belongs to all the people of the state is to be effectively managed for the benefit of all its people, it must have full power to do so as has been so often stated by this court.

The result of an uncontrolled fishery on the vulnerable salmon stocks in the Pacific Northwest is no secret even to the federal government which openly supports and encourages the unlawful fishing activities of the appellants.

The United States has proposed that pursuant to 25 C.F.R. Part 256, it will, in cooperation with the states and the Indian tribes, make regulations whereby the Indians may enjoy their access to the fishery on a fair and equitable basis.

The Government's proposition was rejected by this

court in *Kennedy v. Becker*, 241 U.S. 556, 563, where this court said:

"It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both."

The United States in its memorandum as amicus curiae concludes:

"... if some limitation on Indian fishing is necessary, perhaps at certain periods of the year it may be that measures short of an absolute prohibition on netting will accomplish the purpose if other fishing is more severely restricted."

The proposal for severely restricting non-Indian fishing is based on a misapprehension of the experience of the states in attempting to restrict non-Indian fishing to make up for increased Indian fishing. Additional restriction of the non-Indian fishery only results in a proportional increase in the effort and catch of the Indians. Consequently, even a total shut-down of the non-Indian fishery would not serve to conserve the resource in the absence of state regulation of the Indian fishery. This leaves the conclusion that the only practical method of assuring the Indians their continued access to the fishery resource is to recognize that only the states can regulate and thus save this resource.

The State of Oregon respectfully submits that the decision of the Supreme Court of Washington in the cases here for consideration should be affirmed.

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February, 1968

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CONFEDERATED TRIBES OF THE	}	CIVIL
UMATILLA INDIAN RESERVA-		
TION, Pendleton, Oregon, et al,	}	No. 77-59
<i>Plaintiffs,</i>		
v.	}	JUDGMENT
H. G. MAISON, Salem, Oregon,	}	GRANTING
individually and as Superintendent,		
Department of State Police of the	}	SUPPLE-
State of Oregon, et al,		
<i>Defendants.</i>	}	MENTAL
		RELIEF

The court having this day made additional findings of fact and conclusions of law on plaintiffs' motion for supplemental relief, now, therefore, in accordance therewith, it is

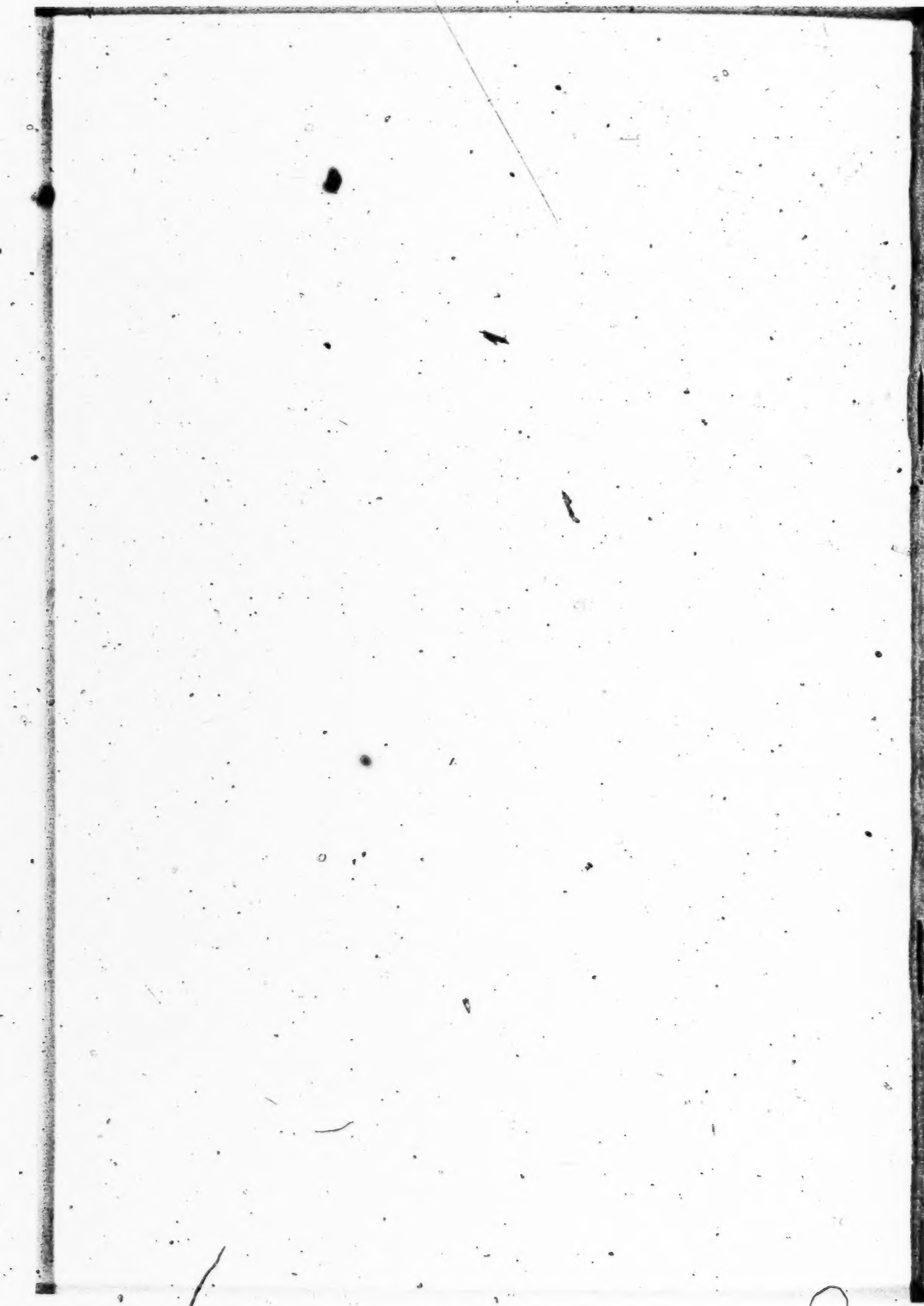
ORDERED, ADJUDGED AND DECREED that defendants H. G. Maison, individually and as Superintendent, Department of State Police of the State of Oregon, Robert Y. Thornton, individually and as Attorney General of the State of Oregon, and Rollin E. Bowles, John P. Amacher, Tallant Greenough, Wayne E. Phillips and Joseph W. Smith, individually and as members of the State Game Commission of the State of Oregon, and each of them, be and they hereby are restrained and enjoined from molesting or interfering with the Confederated Tribes of the Umatilla Indian Reservation, or its members, in taking fish, including eel or lamprey, at, upon and within 200 feet above and below Three-Mile Dam on the Umatilla River; it is further

ORDERED, ADJUDGED AND DECREED that it is not necessary at this time to grant further injunctive relief, but jurisdiction again is reserved to grant further relief in an appropriate proceeding upon application by plaintiffs and a proper showing of the necessity thereof.

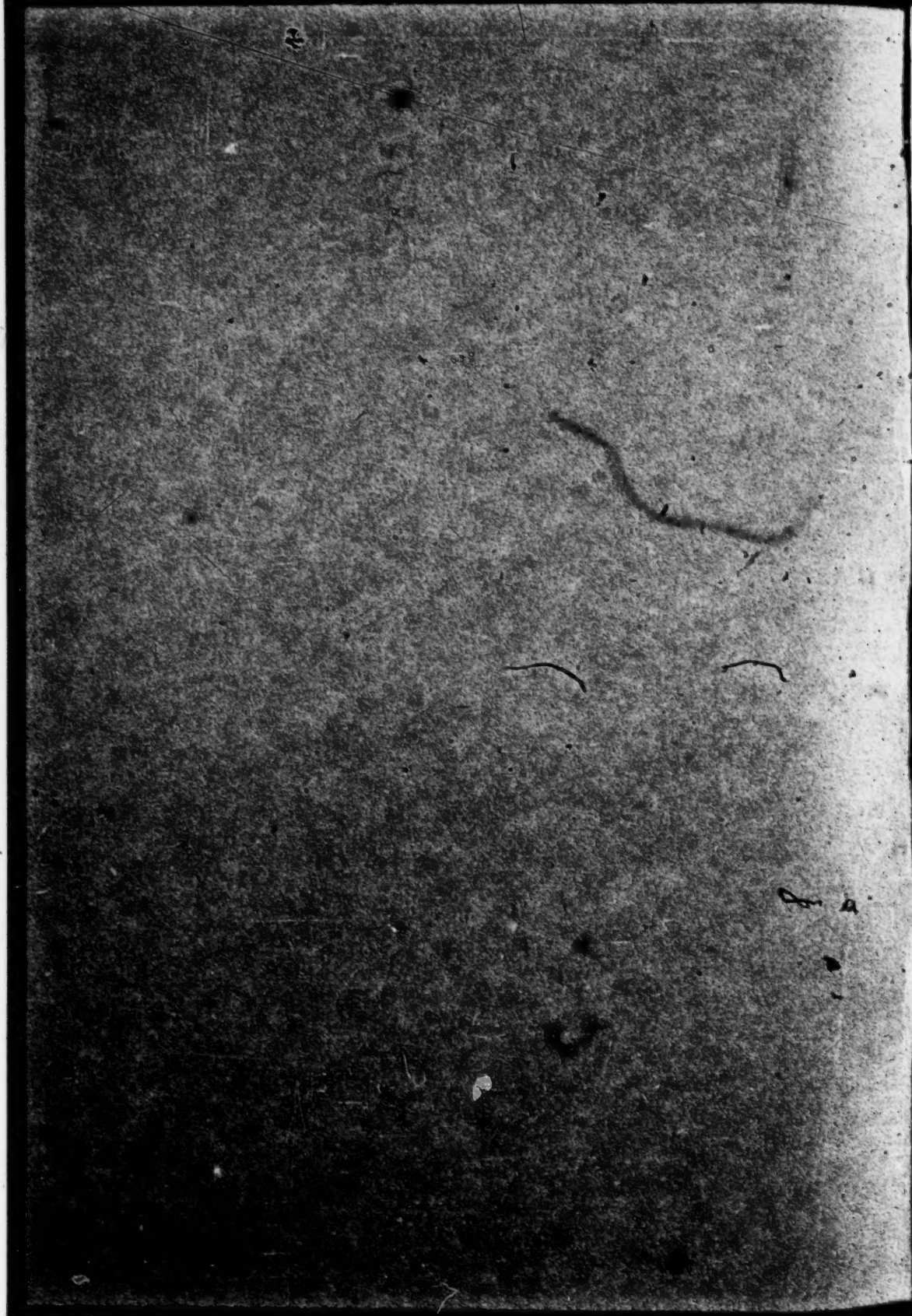
DATED this 5th day of August, 1963.

/s/ GUS J. SOLOMON
District Judge

Presented by:
Mark C. McClanahan
of Attorneys for Plaintiffs



DEPARTMENT OF CASE OF THE
STATE OF WASHINGTON



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

THE PUYALLUP TRIBE, *Petitioner*

V.

DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON, ET AL.

NUGENT KAUTZ, ET AL., *Petitioners*

V.

DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE STATE OF IDAHO
FISH AND GAME DEPARTMENT AS AMICUS CURIAE

STATEMENT OF INTEREST

The State of Idaho through its Fish and Game Department, being represented by its Attorney General, pursuant to Rule 42, par. 4, Revised Rules of the Supreme Court of the United States, urges the affirmation of the decrees of the Supreme Court of the State of Washington in *Department of Game*

v. The Puyallup Tribe, Inc., 70 W. D. 2d 241, 422 P.2d 754 (1967) and *Department of Game v. Nugent Kautz*, 70 W. D. 2d 270, 422 P.2d 771 (1967).

The Idaho Fish and Game Department is organized under Title 36 of the Idaho Code and has the duty to preserve, protect, propagate and manage the fish and wildlife resources within the State of Idaho and in waters boundary thereto.

The State of Idaho supports a large anadromous fishery resource and a sizable portion of the State's economic structure is built around sport fishing by residents and non-residents for anadromous fish.¹

All anadromous fish migrating from the Pacific Ocean to their natal streams in Idaho must first ascend the Columbia River and then the Snake River where the same are subject to off-reservation fishing by Indians who are members of tribes located in Washington, Oregon and Idaho.

For the above and foregoing reasons the State of Idaho has long been concerned with the impact of off-reservation Indian fishing, both commercial and non-commercial on the anadromous fishery resources of the States of Washington, Oregon and Idaho.

A determination by the United States Supreme Court of the right of the State of Washington to impose reasonable and necessary regulations upon off-reservation treaty Indian fishing will also be determinative of the right of the State of Idaho to

¹ Over 250,000 licensed anglers spend over \$35 million annually in Idaho. *Idaho Wildlife Review*, Vol. XVIII, No. 4, Idaho Fish and Game Department, March-Apr. 1966, page 3.

impose regulatory restrictions as are reasonable and necessary for the conservation of the fishery resource upon Indians in Idaho who claim treaty off-reservation fishing rights under treaty provisions identical to or very similar to the provisions of the Treaty of Medicine Creek, 10 Stat. 1132.

QUESTION PRESENTED

Whether treaty Indians fishing off their reservation at usual and accustomed grounds and stations are totally immune from state statutes or regulations established to be reasonable and necessary for the conservation of the fishery resource.

ARGUMENT

As was stated by Judge Rosellini of the Supreme Court of the State of Washington in *State v. McCoy*, 63 Wn. 2d 421 at page 426 *et seq.*, 387 P. 2d 942 (1963):

To ascertain whether regulation is reasonably necessary for conservation of Pacific salmon, one must understand the life cycle of these fish.

Pacific salmon are anadromous fish; that is, they are hatched in fresh water, descend to salt water, attain most of their growth there, and then return to the stream of their origin to spawn and perpetuate their kind. After spawning, they die. They have a well-developed homing instinct that enables them to return to spawn in the stream of their origin. Spawning occurs in the fall and winter in well-percolated gravel beds, where the fish bury their eggs to

protect them from predators and the elements. The eggs hatch in the gravel and the fish live there for a time, subsisting on the yolk material from the egg. After emerging from the gravel, the young fish begin to swim actively. Depending on the species, some salmon spend a year or more in fresh water before migrating to sea, while others leave for ocean environment within a few weeks or months after emerging from the gravel of the nest. Three to five years later, the chinook salmon return from the sea to the river of their birth to spawn.

After the various species of salmon near maturity and are in prime condition, they leave the extensive pastures of the sea to begin the long journey to the home stream of their origin. It is during this period of the salmon's life that the main effort toward harvest is concentrated. While still at sea the chinook, silver, and pink salmon are caught by the commercial and sports trollers off the coasts of Alaska, British Columbia, Washington, Oregon, and California. After these species enter the inside waters off the mouths of their spawning streams, their numbers are further reduced by net fisheries.

When the survivors escape the last net fishery in the rivers of their birth, they deposit their eggs in the gravel to perpetuate their kind, complete the life cycle and die.

There are three races of chinook salmon—spring, summer and fall—entering Idaho waters. Studies made of these fish indicate the races are separated from one another, if not altogether by time, by the

streams they use and different spawning areas. The races are separated primarily by the time of entry into the Columbia River, and to a degree on the time they enter Idaho waters. In addition to the chinook salmon, steelhead trout and a small run of sockeye salmon also ascend the Columbia River to spawn in Idaho waters.

It has been determined that Idaho's contribution to the anadromous fishery of the Columbia River above Bonneville Dam amounts to approximately 50 per cent of the "up-river run" of spring and summer chinook salmon and 65 per cent of the up-river Columbia River steelhead fishery. Due to the recent construction of hydroelectric projects in the Middle Snake River between Idaho and Oregon and the artificial propagation of all fall chinook now arriving at these dams, it is presently impossible to estimate Idaho's contribution to this race of fish.

In early days tremendous numbers of salmon and steelhead entered Idaho waters on their way to spawning beds. Descendants of these historic migrations still move up streams which remain open to passage but in numbers that may be counted as a fraction of the once great runs.

Historically the Indians fished mainly for salmon because of the fact that steelhead generally appeared to spawn in areas accessible to the Indians only during times of high water. Thus, the Indians could not take significant numbers of these fish with their primitive gear. However, the salmon

were available, arriving after the spring run-off and reaching their spawning grounds during periods of low water which made the fish vulnerable to the Indian fishery. The Indians, using leather webbed dip nets, willow traps and wooden spears and clubs, netted, trapped, speared and clubbed the salmon at major falls and along the shallow spawning beds.

In historic times, salmon could be trapped, netted, speared or snagged by Indians and non-Indians alike. However, in 1919 the use of traps and dip nets was prohibited; in 1921 the use of nets was prohibited, and in the early 1940's regulations were established to prohibit use of spears and snagging equipment. Section 36-902, Idaho Code, as amended. Reduced limits became effective in the mid-1940's. About the same time, Idaho started closing head-water tributaries of the Salmon River to protect salmon on spawning beds. Practically all of the upper drainages, and many sections of main streams, are now closed at one time or another to provide unmolested spawning. Method of take is now limited to a single hook in some waters and to a rod and reel in all waters. Season limits have been set to further conserve the resource. Salmon fishing seasons have been reduced in Idaho and were completely prohibited in the year 1965 as a part of the management program to permit escapement for natural spawning and perpetuation of the fish.

In addition to regulatory measures, the Idaho Fish and Game Department, in cooperation with

interested conservation agencies and private industry, has undertaken a large-scale program for the conservation of the resource. This program has involved the construction of hatcheries and artificial propagation and rearing facilities for salmon and steelhead; the restoration of chinook salmon runs in the Clearwater River drainage; the replacement of inadequate fish passage facilities at hydroelectric projects with new, adequate facilities; the construction of spawning beds and hatching channels on the Clearwater River drainage; the construction of fish passage facilities around natural obstructions in the headwater tributaries of the Salmon River and Clearwater River drainages; the removal of abandoned hydroelectric dams; and the construction of fish screen structures and by-pass facilities in the Upper Salmon River drainage to prevent loss of young salmon and steelhead during their downstream migrations. The expenditures in construction costs in this program has, since 1956, exceeded the sum of \$30,000,000.00.

Despite the intensive conservation and restoration program, the future of the anadromous fishery in Idaho (and the Columbia River system) is clouded with hazards. Many factors such as dam construction, pollution, and the Indian and non-Indian commercial fishery, enter the picture and all affect the fish to a degree, not the least of which is the unregulated Indian commercial, "off-reservation" fishery.

Since the construction of The Dalles Dam, the

reported Indian catch of anadromous fish has climbed; for instance, in the catch of steelhead, from a few hundred fish caught in the year 1957 to a catch of better than 15,000 fish being taken in the year 1967. This same picture is true for the races of spring and summer chinook. In 1957 the reported Indian catch of spring and summer chinook was less than a thousand fish. In 1967 the reported Indian catch amounted to 10,800 spring chinook, and 9,800 summer chinook, together with 35,000 sockeye, 11,500 coho and 37,900 fall chinook.² Generally speaking, the increase in the intensity of the Indian fishery on the Columbia River parallels their adoption and use of modern, efficient, nylon gill nets commencing some seven years ago, with an increase in the size of the catch every year thereafter. Concurrently, during the same period of time, the non-Indian commercial fishery below Bonneville Dam for these same runs of fish has steadily declined due to the imposition of reduced seasons.

It has been determined that the biggest problem with the Indian fishery on the Columbia River and its tributaries is the same that is existent with an Indian fishery on any other stream in the Pacific Northwest; that is, that this fishery is unregulated. Due to the fact that the Indian fishery is unregulated, the involved conservation agencies have no control over the off-reservation fishery and thus the size of its catch is unpredictable resulting in an

² "1967 Status Report on the Columbia River Commercial Fisheries," Oregon Fish Commission—Washington Department of Fisheries, January 1968.

unpredictable impact upon the necessary escapement of productive stocks of fish and in some cases the virtual annihilation of the brood stock.

A report of the impact of an unregulated Indian fishery upon the productive stock of a race of anadromous fish indigenous to a particular stream or watershed is contained at page 52 of the "74th Annual Report of the Washington State Department of Fisheries," 1964:

The Yakima Indians were again active, and highly successful, in their spring chinook dip net fishery on the Yakima River during 1964. Fishing began in late April at Horn Rapids and Prosser Dams on the lower river and continued until mid-June at Sunnyside and Wapato Dams on the upper river.

This very efficient fishery took an estimated 3,191 spring chinook which represents approximately 97% of the total run into the Yakima River System. The Roza Dam fish counts indicated only 33 spring chinook escaped into the upper Yakima River, the lowest escapement since counting started in 1940. Spawning ground surveys on the Naches River and tributaries revealed an escapement into this system of approximately 75 chinook.

This was the third successive year that the Indian fishery has virtually exterminated the spring chinook run. In 1962 and 1963 the fishery took approximately 82% and 90% of the runs, respectively. Next season, 1965, marks the final year that this fishery will take an appreciable catch as the four year cycle will then be completed and returns from the low

escapements are anticipated to be negligible.

Experience has shown that once a specific run of fish utilizing a specific spawning area is exterminated, it has proven to be extremely difficult to restore the run to its former existent condition by means of transplantation of stock from other streams or watersheds.

The petitioners herein are laying claim to off-reservation treaty fishing rights by virtue of Article III of the Treaty of Medicine Creek (10 Stat. 1132) free from restriction in any manner "at usual and accustomed grounds and stations" where the state has not demonstrated that regulations are "indispensable" to the conservation of the fish. The pertinent treaty language states:

Article III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * * (10 Stat. 1132).

The above-quoted terminology is found without significant variation in nearly all of the Indian treaties executed in the Pacific Northwest.³ Despite this similarity of treaty language, state and federal courts in the States of Idaho, Oregon and

³ For purposes of comparison we have reproduced in the Appendix pertinent articles of the Treaty with the Nez Perce (12 Stat. 957). See also Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinaielt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III.

Washington have varied in their construction of the treaty language as the same relates to off-reservation fishing and hunting.

In *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1954) the Supreme Court of Idaho held that the State was powerless to enforce its conservation laws against Nez Perce Indians hunting off the reservation on open and unclaimed lands ceded by the Indians to the United States. It is to be noted that *Arthur* is silent upon the question of off-reservation fishing rights, but at page 255 of the decision, the court briefly touched upon fishing rights:

On the other hand, defendant urges that the reserved right to hunt on the ceded lands, unlike the reserved right to fish, was not in common with the citizens of the territory but constituted an unqualified, continuing property right reserved by the tribe and is not subject to state regulations * * *.

In *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) the Circuit Court of Appeals held that the State of Oregon could only apply its conservation laws and regulations to Indians fishing outside their reservation when the same were "indispensable" to the preservation of the resource.

In the decisions below, the Supreme Court of Washington held that the Puyallup and Nisqually Indians continue to have a right under Article III of the Treaty of Medicine Creek to fish outside reservation boundaries at usual and accustomed grounds and stations, but that their off-reservation

fishing rights are subject to state conservation laws and regulations which are reasonable and necessary to preserve the fishery (No. 247, A. 54; No. 319, A. 15).

It is generally recognized that the rationale of the Idaho Supreme Court in the *Arthur* case, *supra*, has been impliedly repudiated by the more recent decisions dealing with off-reservation treaty Indian fishing and hunting, and that it will not survive the test of time. A well reasoned critique of this case is set forth at page 525 of Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo. Wash. L. Rev. 504 (1964).

The *Arthur* rule holds that Indians are exempt wholly from state regulation on off-reservation treaty hunting grounds. Even though certiorari was denied, it is doubtful that this holding will survive. The *Arthur* court felt that the Supreme Court had repudiated *Race Horse* and *Kennedy*, and that the *Tulee* statement approving state regulation was merely dicta. However, the Supreme Court in *Organized Village of Kake*, again in dicta, cited *Race Horse* and *Tulee* with approval. This certainly tends to neutralize if not repudiate the reasoning of *Arthur*.⁴

In considering the so called "indispensable" rule set forth by the 9th Circuit Court of Appeals in

⁴ The decisions of this Court to which the author has reference are: *Ward v. Race Horse*, 163 U.S. 504 (1896); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942) and *Village of Kake v. Egan*, 369 U.S. 60 (1962).

Maison v. Confederated Tribes of the Umatilla Indian Reservation, supra, we are persuaded by the extensive analysis by the Court below in answer to the Court of Appeals theory and submit that it lays the same to rest (No. 247, A. 50-53). We direct this Court's attention to a portion of the lower Court's opinion which points out the fact that the "indispensable" test for regulation of the off-reservation Indian fishery places an impossible burden upon the state in meeting its duty of conserving the resource for the benefit of all of its citizens, Indian and non-Indian alike.

We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.

It would make the competent exercise of the state's inherent power of preservation an impossibility. (No. 247, A. 52)

Under the Tenth Amendment to the Constitution of the United States the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people. By virtue of this Amendment the Supreme Court of the United States has historically held that title to the wildlife resources insofar as they are capable of ownership, vests in

the state as trustee of *all* the citizens of the state. Therefore, neither the Federal Government nor the Indian tribes have the power to regulate the wild-life resources of the states.* Further, the states have no power to convey their title to these resources nor to relinquish any of their police powers of management of the same; and in this regard the Supreme Court of the United States has never held that the states lack power to control off-reservation fishing and hunting by treaty Indians.

The leading case supporting a state's right to regulate fish and game within its borders is *Geer v. Connecticut*, 161 U.S. 419 (1896). This case held that the states inherited from the original colonies the rights that the colonies inherited from the Crown of England.

That this doctrine extends to control of off-reservation hunting by treaty Indians in states later admitted to the union was settled by *Ward v. Race Horse*, 163 U.S. 504 (1896), which held:

The power of the state to control and regulate the taking of game cannot be questioned. (163 U.S. 507)

. . . on her (Wyoming's) admission into the (union) she at once became entitled to and possessed all of the rights of dominion and sovereignty which belonged to the original states (163 U.S. 513) (Parenthetical material supplied)

Doubtless the rule that treaties should be so

* See 25 C.F.R., Part 256—Off-Reservation Treaty Fishing. Sec. 256.1 (a) (6).

construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an Act of Congress, and also destructive of the rights of one of the states. (163 U.S. 516)

This case is the genesis of the "equal footing" doctrine and has never been overruled but has recently been cited with favor by the Supreme Court in *Village of Kake v. Egan*, 369 U.S. 60 (1962).

The fallacious doctrine of dual sovereignty over the fishery and wildlife resource was firmly repudiated in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). Here the Seneca Indians, supported by the United States Department of the Interior in its brief, argued that they could regulate Indian fishing and the state could regulate non-Indians. The Court rejected this proposition and ruled that dual regulation was no regulation at all and would only give to each the power to destroy the resource. At pages 563 and 564, the Court stated:

... We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or to so divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of

fishing and hunting upon the granted lands *in common* with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, which inhered in the sovereignty of the State over the lands where the privilege was exercised . . . (Emphasis supplied)

. . . We also assume that these Indians are wards of the United States, under the care of an Indian agent; but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the *locus in quo*. *Ward v. Race Horse*, *supra*; *United States v. Winans*, *supra*.

This *amicus curiae* submits that *United States v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), merely held that the Yakima Indians under the provisions of Article 3 of the Treaty with Yakama Indians, June 9, 1855, (12 Stat. 951) had the right to resort to the fishing grounds of the Columbia River and to "make use of them in common with the other citizens of the United States." (249 U.S. 199) These two cases in effect did nothing more than recognize the survival of this "in common" right as against private interference and certainly did not vest in the Indians a superior or exclusive right as is advocated in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, *supra*, and *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

• In 1942 the Supreme Court decided *Tulee v. Washington*, 315 U.S. 681. The actual holding in

Tulee was that the Indians' off-reservation treaty rights exempted them from state license fees. The Court held, in dicta, that the state could regulate the Indians' fishing.

... the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. . . . (315 U.S. 684)

Again, in dicta, and also at page 684 of the decision, the Court said:

From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. (315 U.S. 684)

While the language relied upon in *Tulee* by the Ninth Circuit Court of Appeals in *Maison, supra*, with respect to the state's regulations being "indispensable" for conservation is pure dicta and was unnecessary to the actual holding in *Tulee*, i.e., exemption from state license fees, it is nevertheless apparent that the Supreme Court was thinking in the terms of an individual Indian's dip-bag net fishing operation which would be considered "primitive" when compared to a modern, unregulated, destructive, Indian gill net fishery of today.

The Supreme Court reiterated its support of state regulation in the case of *Village of Kake v. Egan*,

supra, decided in 1962. This case involved an attempt by the United States Department of the Interior to license and permit certain Thlinget Indians of the Villages of Kake and Angoon to operate fish traps in violation of the anti-fish-trap conservation law of the State of Alaska. Justice Frankfurter, speaking for a unanimous court, cited *Ward v. Race Horse*, *supra*, and *Tulee v. Washington*, *supra*, as support for its statement at pages 75 and 76 of the decision:

Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are

no merely local matter.

Kake, therefore, finally establishes that a state may regulate off-reservation hunting and fishing activities where the same are exercised by treaty Indians and that it may also apply its conservation laws to Indians claiming special privileges based on aboriginal use and occupancy. The case firmly rejected the attempt by the United States to enforce regulations governing off-reservation Indian fishing when the same are violative of state conservation laws.

CONCLUSION

For the foregoing reasons, the State of Idaho Fish and Game Department, as *amicus curiae*, respectfully urges that the decisions below in Case No. 247, *The Puyallup Tribe v. Department of Game of the State of Washington, et al.*, and Case No. 319, *Nugent Kautz, et al. v. Department of Game of the State of Washington, et al.*, be affirmed.

Respectfully submitted,

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FEBRUARY 1968.

APPENDIX A

SECTION 36-902 IDAHO CODE

It shall be a misdemeanor for any person or persons to catch, attempt to catch or kill any species of fish whatever in any of the streams, rivers, lakes, reservoirs or waters of this state with any seine, net, spear, snag hook, weir, fence, basket, trap, gill net, dip net, trammel net or any other contrivance, except as provided by order of the state fish and game commission . . .

APPENDIX B

TREATY WITH THE NEZ PERCE

Treaty between the United States of America and the Nez Perce Indians. Concluded at Camp Stevens, in the Walla-Walla Valley, June 11, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN,
PRESIDENT OF THE UNITED STATES OF
AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL
COME, GREETING:

[Title.]

WHEREAS a treaty was made and concluded at the treaty ground, Camp Stevens, in the Walla-Walla Valley, on the eleventh day of June, one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and Joel Palmer, superintendent of Indian affairs for Oregon Territory, on the part of the United States, and the hereinafter-named Chiefs, Headmen, and Delegates of the Nez Perce tribe of Indians occupying lands lying partly in Oregon and partly in Washington Territory, between the Cascade and the Bitter Root Mountains, on behalf of and duly authorized by said tribe, which said treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, in

the Walla-Walla Valley, this eleventh day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and Joel Palmer, superintendent of Indian affairs for Oregon Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nez Perce tribe of Indians occupying lands lying partly in Oregon and partly in Washington Territories, between the Cascade and Bitter Root Mountains, on behalf of, and acting for said tribe, and being duly authorized thereto by them, it being understood that Superintendent Isaac I. Stevens assumes to treat only with those of the above-named tribe of Indians residing within the Territory of Washington, and Superintendent Palmer with those residing exclusively in Oregon Territory.

[Cession of Lands to United States.]

ARTICLE I. The said Nez Perce tribe of Indians hereby cede, relinquish and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit: Commencing at the source of the Wo-na-ne-she or southern tributary of the Palouse River; thence down that river to the main Palouse; thence in a southerly direction to the Snake River, at the mouth of the Tucanon River; thence up the Tucanon to its source in the Blue Mountains; thence southerly along the ridge of the Blue Mountains; thence to a point on Grande Ronde River, midway between Grand Ronde and

the mouth of the Woll-low-how River; thence along the divide between the waters of the Woll-low-how and Powder River; thence to the crossing of Snake River, at the mouth of Powder River; thence to the Salmon River, fifty miles above the place known [as] the "crossing of the Salmon River;" thence due north to the summit of the Bitter Root Mountains; thence along the crest of the Bitter Root Mountains to the place of beginning.

[Reservation - - Boundaries]

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the said tribe, and as a general reservation for other friendly tribes and bands of Indians in Washington Territory, not to exceed the present numbers of the Spokane, Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians, the tract of land included within the following boundaries, to wit: commencing where the Moh-ha-na-she or southern tributary of the Palouse River flows from the spurs of the Bitter Root Mountains; thence down said tributary to the mouth of the Ti-nat-pan-up Creek, thence southerly to the crossing of the Snake River ten miles below the mouth of the Al-po-wa-wi River; thence to the source of the Al-po-wa-wi River in the Blue Mountains; thence along the crest of the Blue Mountains; thence to the crossing of the Grand Ronde River, midway between the Grand Ronde and the mouth of the Woll-low-how River; thence along the divide between the waters of the Woll-low-how and Powder Rivers; thence to the

crossing of the Snake River fifteen miles below the mouth of the Powder River; thence to the Salmon River above the crossing; thence by the spurs of the Bitter Root Mountains to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant, guarantying, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided that any substantial improvement heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation, and no Indian will be required to aban-

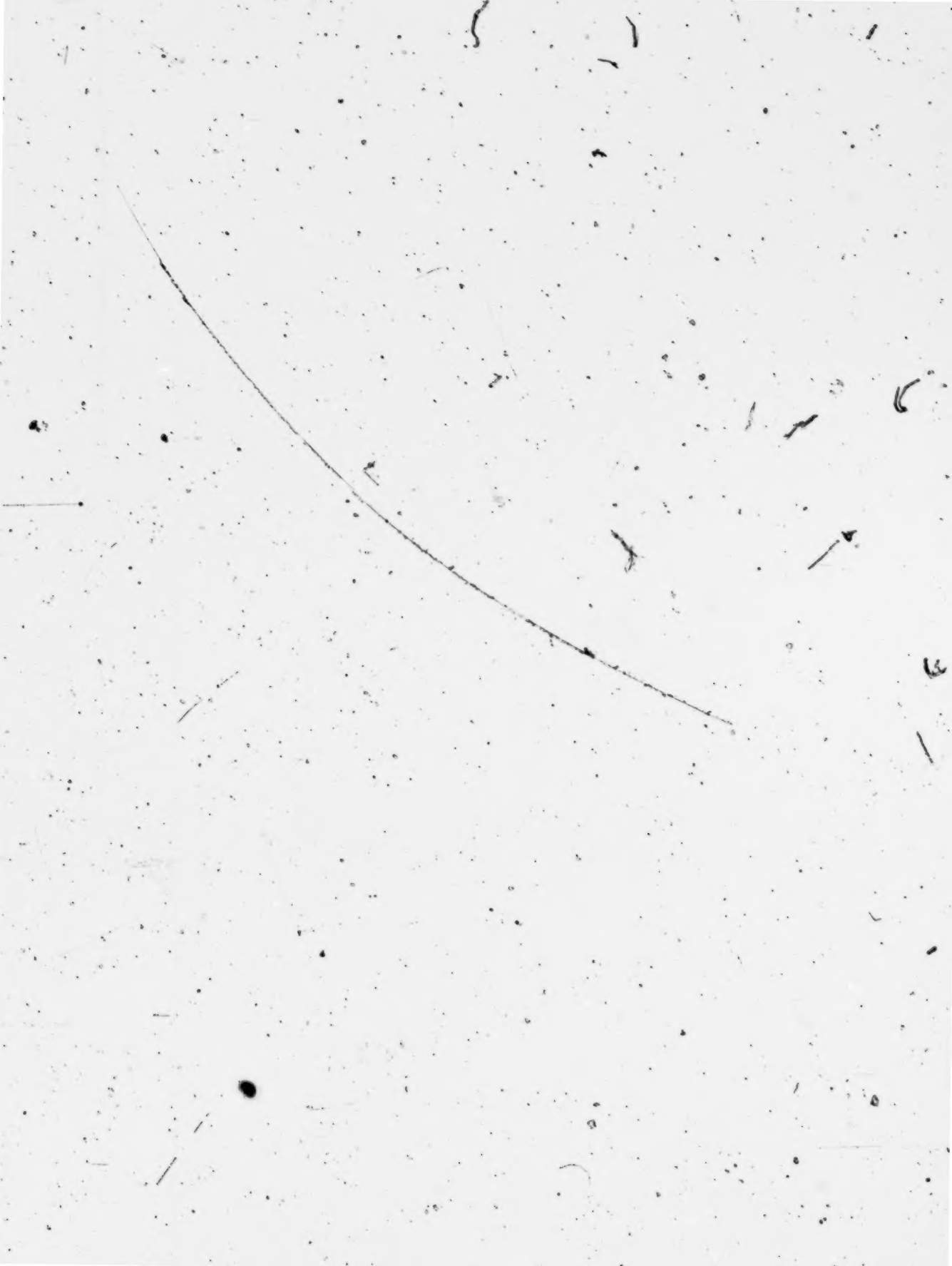
don the improvements aforesaid, now occupied by him, until their value in money or improvements of equal value shall be furnished him as aforesaid.

[Roads - - Fishing and Hunting]

ARTICLE III. And provided that, if necessary for the public convenience, roads may be run through the said reservation, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways. The use of the Clear Water and other streams flowing through the reservation is also secured to citizens of the United States for rafting purposes, and as public highways.

The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

* * *



MAR. 20 1968

JOHN S. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington
REPLY BRIEF FOR THE PETITIONER

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January 30, 1968

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To the Supreme Court of the State of Washington
REPLY BRIEF FOR THE PETITIONER**

In reply to the Brief for the Respondents Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, the Indian petitioners respectfully present for the Court's attention the following comments:

TREATY AND STATUTES INVOLVED

On pages 8 and 9 of Respondents' Brief, three separate statutes are cited with the introduction on page 8, "State laws most violated by Indians claiming off-reservation fishing rights are:" This connotes the impression that state statutes have been enacted in the State of Wash-

ington which prohibit or restrict Indian Treaty fishing rights.

Respondents have cited no statute nor do petitioners know of any whereby the legislature of the State of Washington has expressed any intention that its fisheries laws have any application whatsoever to prohibit Indian Treaty fishing rights. Petitioners submit that the court below assumed a legislative authority vested only with the legislature and the people of the State of Washington by virtue of Article II, Section 1 of its State Constitution, in applying the state's fisheries laws to prohibit the exercise of Indian Treaty fishing rights.

The legislature of the State of Washington has always recognized the privileges and immunities of Indian Treaty fishing rights from State regulation and has never expressly, impliedly, or affirmatively removed that recognition.

The state of Washington legislature in the 1915 fisheries code, Chapter 31, states its express recognition of these rights in Section 42 as follows:

"Nothing in this act shall prevent any Indian from taking fish at any time without a license for the consumption of himself or family with a drag seine not more than three hundred feet in length or with a set-net, in any of the salt waters bordering any Indian reservation and within one-half mile thereof, or with a set-net extending not more than one-third across the waters of any river or stream flowing through or bordering on any such reservation and within five miles of the boundaries thereof. Provided, however, that this section shall not apply to the Nooksack River."

The State of Washington legislature and the people of this State by Initiative Measure No. 77 again restated this

recognition in Section 9 of Chapter 1, Laws of 1935 which provided stringent regulations as to commercial fishing in Puget Sound and waters tributary thereto, as follows:

"The provisions of this Act do not apply to fishing by Indians under Federal regulations, or the use of any device or means by the State or National government in catching fish for propagation or scientific purposes."

The purpose of this exemption was to preserve to Indians their reserved Treaty fishing rights. *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P.2d 24 (1935).

The legislature again in 1945 affirmatively recognized the immunity of Indian Treaty fishing rights from state of Washington regulation in Section 2 of Chapter 122, Laws of 1945 as follows:

"It shall be unlawful for any person to fish or to take for sale or profit any salmon or other food or shell fish from any of the rivers or waters of this state or over which it has concurrent jurisdictions in civil or criminal cases, unless such person is a citizen of the United States or has declared his intention to become such, and has a proper license to catch the kind of fish taken and use the method employed; *but this section shall not apply to Indians in such manner as to affect their existing fishing rights.*"

And again in Section 6, Chapter 36, Laws of 1963 (R.C.W. 37.12.060) the State of Washington legislature affirmatively recognized this immunity of Indian fishing rights reserved by Treaty in an Act in which the federal government allowed the state to assume criminal and civil jurisdiction over Indians for certain purposes as follows:

"Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or Indian Tribe, band, or com-

munity that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner *inconsistent with any federal treaty, agreement, or statute or any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian Tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof.*"

In enacting the 1949 fisheries code (Title 75 R.C.W.) in Chapter 112 of that session, the legislature of the State of Washington again affirmatively recognized the immunity of reserved Indian Treaty fishing rights by Section 8 of that act (R.C.W. 75.08.140) by giving the director authority to require brands, tags or other devices to be attached to fish sold from private hatcheries and Indian reservations. The title to the 1949 fisheries code, Chapter 112, Laws of 1949 is a restrictive title naming in detail all phases of the fishing industry and includes a general repealer. Nowhere in the title to the act is there any notice given to the members of the legislature that reserved Indian Treaty fishing rights were to be completely subjected to state regulation. Indeed, Section 8 of that 1949 Act indicates the legislative intent that just the opposite was the case as there would be no reason to bestow upon the director the power to cause fish caught by Indians to be identified as Indian fish unless the Indians had special Treaty privileges under which their fish could be taken. The provisions of the first three sections quoted from herein were buried in the wholesale schedule of

fisheries laws repeals contained on Pages 302, 303, 304, 305 and 306 of this same 1949 Act. Petitioners submit that this conveyed no affirmative expression by the legislature that Indian fishing rights were thereafter to be completely subjected to state fishing regulations, as Section 8 of the 1949 Act conveyed the opposite impression and Section 85 carefully preserved to any person any right or protection secured to him by the Constitution of the United States. Any contention that the 1949 enactment of the fisheries code removed the recognition by the legislature of this State of the immunity of Indian Treaty fishing rights from state fisheries laws and regulations is untenable as there was no expression of such intention or notice in the title to the Act and under the decisional law of the State of Washington expressed in *Price v. Evergreen Cemetery Company*, 57 Wn.2d 352, 357 P.2d 702 (1960), the 1949 fisheries code insofar as it relates to removal of this immunity would be unconstitutional.

The administrators of the respondent departments are fully aware that there are no State of Washington statutes prohibiting the exercise of Indian Treaty fishing rights and that State conservation statutes do not apply to Indian Treaty fishing rights. Otherwise, they would knowingly have violated these same statutes in working out an agreement with the Makah Tribe to allow them to net fish at their usual and accustomed grounds on the Hoko River without State interference, which resulted in the following regulation promulgated by respondent department of fisheries: Washington Administrative Code (WAC 220-48-040).

" . . .

"(8) It shall be lawful for members of the Makah

Indian Tribe to take, fish for or possess salmon taken with gill net gear in the Hoko River from the Highway 9-A bridge to the mouth from September 15 to November 30, both dates inclusive: PROVIDED, That it shall be unlawful to fish during weekly closed periods running from 3 p.m. Sunday to 3 p.m. Friday from September 15 through October 31, and from 3 p.m. Monday to 3 p.m. Friday from November 1 through November 30. Gill nets shall have meshes not less than 65/8 inches stretch measure.

This is the same type of activity of petitioners prohibited by the court below as being in violation of state statutes or regulation of respondents promulgated pursuant thereto.

This administrative interpretation that neither the legislature nor the people of the State of Washington have ever intended to make the fisheries and game fish laws of the State applicable so as to restrict or abolish Indian Treaty fishing rights starkly stands out from this further salient fact.

Nowhere in the multitude of rules and regulations adopted by the administrators of the respondent departments is there even one past or current promulgation of a rule or regulation applying the State's fisheries or game fish laws to Indian Treaty fishing in any manner, unless consented to by the Indian Tribe involved. It is submitted that the reason for this is obvious. Any such regulation would be an unconstitutional assumption of legislative authority as there is no state statute making these laws so applicable. The statutory and regulatory evidence is that the administrators of the state departments involved have expressly recognized the immunity of Indian Treaty fishing rights from state fisheries laws.

STATEMENT OF THE CASE

1. On page 10 of respondents' brief it is pointed out that the State of Washington expends large sums of public monies to develop spawning acres, hatcheries, fish ladders, correction of pollution, etc. It should be pointed out that a large percentage of these funds is reimbursed back to the state from the federal government (For example, see RP Ex. 32, Page 51 of Washington State Department of Fisheries 73rd Annual Report for 1963). Petitioners suggest that in light of these federal expenditures perhaps the federal government should have a part in the determination of who should share in the fish reared with these federal funds.

2. On page 11 of respondents' brief the following statement appears:

"Those laws and regulations completely prohibit net fisheries in all rivers and streams within the state. The Puyallup River is therefore closed to net fishing."

This statement does not appear to be accurate. Commercial netting of salmon and steelhead in and at the mouth of several rivers and streams of the State are permitted by regulations of the respondent department of fisheries. The following are examples of some of the current regulations of this department permitting such netting are:

"WAC 220-36-010 SALMON FISHING AREAS. (1) Grays Harbor Fishing Area No. 1 shall include the waters of Grays Harbor and the *Chehalis River* with the following exceptions:

"(a) The *Chehalis River* upstream from the Union Pacific railroad bridge.

"(b) Those waters inside or southeasterly of the Bay City bridge.

"(c) Those waters within a radius of one-quarter mile of a monument set on the beach near the mouth of Chenois Creek.

"(d) Those waters easterly of a line starting at a monument located on the point of Holman Bluff near the mouth of Grass Creek and projected to a monument set on Point New.

"(e) Those waters northerly of a line starting at a monument located near the beach in front of the Giles Hogan residence, located west of the mouth of the *Humptulips* River, thence projected in a southeasterly direction to a monument set on the most southerly tip of the grass spit at the mouth of the *Humptulips* river, thence projected in an easterly direction to a monument on Chenois Bluff near the tripod indicated on U.S.C.G.S. Chart No. 6195, published July, 1949.

"(f) All other streams tributary to Grays harbor upstream from their mouths.

"(2) Grays Harbor Fishing Area No. 2 shall include those waters of Grays Harbor lying westerly of a line projected from the Point Chehalis Light at Westport 354 degrees true to Point Brown; and those waters lying easterly and northerly of a line projected from the outermost end of the north jetty to can buoy No. 5 at the entrance to Grays Harbor, thence to lighted whistle buoy No. 4 and thence easterly to the Point Chehalis Light at Westport. [Subsection 1 from Order 336 and 256; filed 3/1/60. Subsection 2 from Orders 465 and 256; filed 3/1/60. Subsection 2 amended by Order 638; filed 4/28/65.]

"WAC 220-36-020 SEASONS AND LAWFUL GEAR—SALMON. (1) It shall be lawful to take, fish for or possess salmon taken for commercial purposes with gill nets in Grays Harbor Fishing Area No. 1 during the following season:

"6:00 p.m. July 11 to 6:00 p.m. November 30. . . ."

• • •

"WAC 220-32-010 COLUMBIA RIVER — FISHING

AREAS. (1) 'Columbia River Fishing Area No. 1' shall include those waters of the Columbia River between its mouth and a point five miles downstream from Bonneville Dam.

"(2) 'Columbia River Fishing Area No. 1-A' shall include those waters of Columbia River Fishing Area No. 1 lying within the following lines: A line extending from the Washougal Woolen Mill oil pipeline on the Washington shore through the Washougal blinker light, thence projected to the Lady Island blinker light; and a line projected true north from the downstream end of Lady Island.

"(3) 'Columbia River Fishing Area No. 2' shall include those waters of the *Klickitat River* between the swinging bridge, approximately one and one-half miles upstream, and a monument located in section 25, township 3N, range 12E, a distance of twenty-five feet downstream from the entrance to the upper Klickitat Falls fishway (No. 5).

"(4) 'Columbia River Fishing Area No. 3' shall include those waters of the Columbia River and Grays Bay lying north of a line projected true east from Rocky Point, easterly of a line projected through Nun Buoy No. 16 from a white boundary marker at the south entrance to Deep River, as shown on U.S. C.G.S. chart No. 6151 and southerly of white boundary markers located on Grays River on a line corresponding to the southern boundary of the N.W. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of section 33, township 10 N., range 8 W.

"(5) 'Columbia River Fishing Area N. 4' shall include those waters of the Columbia River and its Washington tributaries not included in Areas 1, 1-A, 2 and 3.

"WAC 220-32-020 — LAWFUL AND UNLAWFUL ACTS. (1) It shall be lawful to take, fish for or possess salmon taken for commercial purposes in Areas 1, 1-A and 3 with gill nets and hand dip nets.

"(2) It shall be lawful for bona fide Indian fish-

ermen to take, fish for or possess salmon taken for commercial purposes in Area 2 with hand dip nets.

The respondent state department of game has long been opposed to the non-Indian commercial netting of steelhead which is permitted in the Columbia River by regulation of the respondent state department of fisheries which allows commercial netting of salmon during periods when steelhead are running up the river.

3. On page 12 of respondents' brief the following statement is made:

"At all times anadromous fish were migrating to their spawning grounds in the Puyallup River, the petitioners have pursued their commercial fishing activities with both set nets and drift nets on a seven day per week, twenty-four hour per day basis. The fishing gear utilized by petitioners effectively blocked passage of anadromous fish ascending the Puyallup River.

"Due to petitioners' intensive and unregulated fishing effort, insufficient numbers of adult spawners have reached the spawning grounds and state hatcheries to perpetuate the runs and races of anadromous fish of the Puyallup River."

The respondent departments cite no testimony or other evidentiary material as support for this statement. On the other hand testimony of respondents own employees called as their own witnesses is directly contradictory. For instance, a state game protector, George Smallwood, (employed by respondents) testified that the set nets never blocked passage because they never went more than half way across the river (A. 169) and that the diagrams introduced by respondents were distorted. Officer Wayland (also employed by respondents) testified

that drift nets are only used on outgoing tides (A. 165) and that they are taken out by tug boats, logs and debris (A. 166) so the netting is never carried on "on a seven day per week, twenty-four hour per day basis." Indeed it would appear inaccurate to say "The fishing gear of petitioners effectively blocked passage of anadromous fish ascending the Puyallup River" when respondents own witness, Dr. Lauren Donaldson who respondents classified as an eminent fishery biologist (Res. Br. 17) testified that in 1956 the sportsmen fishing up the river from the Indian fishery caught 18,500 anadromous fish while the Indians through whose net fishery the fish had to pass to ascend the river to the sport fishery caught only 1,500 (A. 164). In 1963 the sportsmen's catch was 10,888 fish as compared to 1,200 for the Indian fishery. (R. St. 585, 586.)

The trial court judge commented after the testimony of respondents' paid Indian fishery observers had been given, that he could find no evidence to the effect that the net fishery of Indian petitioners blocked or swept the river of fish (A. 105) and struck a statement of respondents' counsel to that effect which was (A. 104) almost identical to that now being offered *as a fact* to the court by that same counsel.

The statement that the "petitioners' intensive and unregulated fishing effort" is responsible for insufficient numbers of spawners reaching spawning grounds is argumentative and connotes the impression that the petitioners are solely responsible for this spawning deficiency. No testimony or other evidentiary material is cited in support of this fanciful statement. It would appear from the fact that 95% to 97% of the catch is harvested by non-Indian commercial and sports fishermen that the Indian

fishery is only about 3% to 5% responsible for this spawning deficiency (A. 28 (Plaintiff's Ex. No. 32), R. P. Ex. 32), A. 164.

The Indian fishery is only "unregulated" in the sense that it is not "regulated" by respondent departments. The commendable self-imposed Indian conservation regulations have been imposed in accordance with immemorial tribal tradition and custom which has a deep rooted religious connotation. The effectiveness of these traditional conservation rules to preserve the fish which are so essential to these people is evidenced by the fact not more than 3% to 5% of the runs are presently being taken by tribal members.

4. Respondents' inject the argument on page 17 of their brief that although the Indian petitioners' fishery is responsible for only 3% to 5% of the total harvest the geographical location of this fishery is biologically unsound because

"The fish making up the various gene pools or races are milling in the Bay and the *lower river* at this time and any net fishery subjects these species to a repeated take on the same fish. The effect is drastically different from a net fishery in Puget Sound as the fish are passing through a geographical area and are only subjected to fishing once (A. 101, 102, 103)." (Emphasis supplied.)

Petitioners' diligent search of the record has not revealed any testimony or other evidence that the fish "mill" around in the *lower river*. Even respondents' own witness, the Assistant Director of the Department of Fisheries J. E. Lasater testified that the milling occurs in the Bay and at the "mouth" of the river where it enters the Bay. Correction of this undoubtedly inadvertent inac-

curacy is important to petitioners because if it is proven that the Indian fishery on "milling stocks" might endanger conservation of the fishery, then the Indian petitioners would be willing to submit regulations for approval by the federal government which would take into consideration the milling stock problem and if necessary operate their fishery in such a manner so as not to affect this milling stock¹.

1. The Indian fishery in this regard does not differ greatly from the manner in which the non-Indian commercial and sports fishermen are permitted to fish under respondents' regulations. The statement on page 17 of respondents' brief describing the commercial seine and gill netting of each run or race of Puyallup fish from the time it enters the Straits of Juan de Fuca and wanders down Puget Sound to the Puyallup River that "the fish are passing through a geographical area and are only subjected to fishing once" by this non-Indian commercial net fishery is misleading. Respondents' witness Assistant Director of the Washington State Department of Fisheries, Mr. Lasater, testified that each run (race or gene pool) of fish are subjected to the "regulated" commercial fishery over and over and over again continuously as it wanders towards the river through "poorer and better grounds" until 95% to 97% of the run has been harvested (A. 172, 173). This "geographical area" comprising the Straits of Juan de Fuca and Puget Sound is nearly 200 miles in length and several miles wide in places. Throughout its length the fish run is subjected to a gauntlet of nets of every type and description. The terminus of this commercial fishery is approximately two miles from the mouth of the Puyallup River at Brown's Point, the most northwesterly point of the Puyallup Indian Reservation on Commencement Bay. Respondents' regulations allow this commercial fishery to be exercised in Commencement Bay.

Note that the fish "milling" in Commencement Bay are subjected directly to a sports fishery permitted by respondents on "milling stocks." Although Mr. Lasater dismissed this as inconsequential due to the inefficiency of pole and line sports fishing it may be noted that hundreds and hundreds of sports fishermen are allowed to fish in the Bay and although the catch of each individual fisherman is relatively small, thousands of Puyallup River fish are taken overall by this method (A. 164, 180).

As demonstrated above, respondents' regulations allow commercial netting of fish in and at the mouth of several other rivers in the State of Washington.

Note also the "regulations" of respondents enforced by court order issued in accordance with the opinion of the court below prohibits petitioners from taking *even one fish* from any location. (A. 69).

5. On page 18 of respondents' brief the following statement is made.

"As an example, it has been recorded that a net fishery in the Fraser River, which is much larger than the Puyallup system, is capable of taking 98% of the migrating fish (A. 132)."

The statement is a paraphrase from the testimony of Dr. Hamilton, one of respondents' own witnesses. *Omitted* from this paraphrased language is the next sentence of Dr. Hamilton which states

"Also, too, it is published in the Annual Reports of the International Salmon Commission that the fishery in U. S. waters, purse seine, reef nets, gill-nets, are capable of taking almost 100 percent." (A. 132).

When respondents' paraphrased statement of this portion of Dr. Hamilton's testimony is read in context with the rest of his statement herein quoted it would seem apparent that all Dr. Hamilton testified to was that any net fishery if intensive enough no matter whether it is located out in the Ocean, in Puget Sound, or in a river is capable of taking nearly all the fish runs. Support for Dr. Hamilton's statement is found in the fact that the non-Indian "regulated" commercial fishery is so intensive that it harvests over 95% to 97% of the fish catch and would be capable of taking nearly 100% if closures were not put into effect. The intensiveness of the commercial fishery is evidenced by the immensity of the nets declared lawful by following department of fisheries regulations:

"WAC 220-48-030 — SALMON, LAWFUL GEAR.(1). Lawful purse seine salmon nets in Puget Sound shall not exceed one thousand eight hundred feet in length along the cork line while wet and purse seine and lead combined shall not exceed two thou-

sand two hundred feet. Neither shall contain meshes of a size less than four inches, nor shall the meshes of the seine and lead be lashed together to form one continuous piece of webbed gear. It shall be unlawful to take or fish for salmon with purse seine gear in Puget Sound which contains mesh webbing constructed of a twine size smaller than 210/30d nylon, 12 thread cotton or the equivalent diameter in any other material. It shall be lawful as part of the purse seine to have a bunt ten fathoms long and two hundred meshes deep which may contain mesh of a size not less than $3\frac{1}{2}$ inches. It shall be unlawful for any purse seine vessel to carry an extra lead or portion thereof unless stowed below decks during the fishing operation, nor may an extra lead or portion thereof be carried aboard its skiff.

"(2) Lawful gill net salmon nets in Puget Sound shall not exceed one thousand eight hundred feet in length nor contain meshes of a size less than five inches. The nets shall be operated substantially in a straight line at right angles to the tide. Circle setting with a bull net or setting a gill net other than substantially in a straight line shall be unlawful.

"(3) Lawful reef net salmon nets in Puget Sound shall not exceed three hundred meshes on any side nor contain mesh of a size less than $3\frac{1}{2}$ inches nor utilize more than two leads. Each of said leads shall not exceed two hundred feet in length measured from the bows of the reef net boats to the nearest end of the head buoys. The use of any false, detached or auxiliary lead shall be unlawful.

"(4) Lawful troll line salmon gear in Puget Sound shall be limited to not more than six lines."

ARGUMENT

1. The Petitioners Have a Special Right To Catch Fish Reserved To Them by Federal Treaty.

Respondents argue on pages 22-36 of their brief that the special right to continue to fish in their immemorial tribal manner reserved to the Indian petitioners by the Treaty of Medicine Creek as one of the negotiated terms for cessation of hostilities did not actually reserve to them fishing rights superior to non-Indians. This contention has been foreclosed by previous decisions of this court. (For discussion of these decisions see pages 2 through 6 of the brief of the Department of Justice entitled "Memorandum For the United States As *Amicus Curiae*").

In addition, the majority opinion of the court below (A. 39-55) relied on so heavily by respondents is adamant that this contention of respondents is without merit, stating:

"The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state."

The *Tee Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) and *Village of Kake v. Egan*, 369 U.S. 60, 72 (1962), cases relied on by respondents are distinguished by the court below (A. 42) on the basis that no Treaty rights were involved in either case and thus they had nothing to do with the historical policy of the Congress to extinguish Indian title through negotiations and not force. See also footnote at A. 41. The title which the Indian petitioners hold to the special right to fish had been reserved to them by the terms of the Treaty of Medicine Creek which was negotiated with the United States.

This "title" is not only "Indian title" but is classified as "reservation" or "Treaty title," sometimes known as "recognized title." Cohen: *Federal Indian Law*, bottom of page 600. What the contention of respondents calls for is the abrogation of this federally "reserved or recognized title" to a right to fish reserved by a duly ratified federal Treaty. *Johnson v. McIntosh*, 21 U.S. 543 (1823), upon which respondents rely does not derogate from this as that case was not referring to "Treaty title," "reservation title" or other "recognized title of the Indians but only the origin of "Indian title" unrelated to a title derived from a duly ratified Treaty between the United States and an Indian Tribe.

The court below succinctly dismissed this contention of respondents' by stating

"Our answer² is that regardless of whether treaties with Indian tribes were necessary, they were deemed desirable by the United States and those entered into by it cannot be repudiated by this state or its courts."

The minutes of the Medicine Creek Treaty³ and Executive Orders⁴ express the importance of fishing to the

2. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 55, 91 L.Ed. 29, 67 S.Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view of the majority opinion as to Indian rights and title in the aboriginal lands when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land; does not suggest the abrogation of the treaties which have been ratified.

3. Heads of proposed treaties Article II provides "The right of fishing and hunting at common and accustomed places is further secured to them."

4. In the Fox Island conference August 4, 1856, Governor Stevens stated "offering you for fishing privileges one half of the waters of the river and the sound, offering to protect you in your rights and also offering to educate your children."

Indians and their exclusive right thereof. Then as now fishing was essential to the tribe. The total prohibition of their treaty fishing right has caused a great hardship upon these people causing many of them to be forced to accept public dole and some even to lose their homes and families. The further unreasonableness of the state's argument that the Indians should fish in the same manner and places as non-Indian citizens is shown by the fact that the Indians are a small minority group having very limited assets and special training. Thus they could not possibly afford to purchase the expensive commercial gear necessary to compete in commercial fishing as the state has suggested. Thus the practical effect of the state position would take from a small impoverished minority for the benefit of a commercial fishing group.

2. The State's Contention That the Reservation Is No Longer Indian Country Is Not Supported by Acts of Congress or the Decisions, and the Reservation and Fishing Rights Continue to Exist

The State contends that the intent of Congress in the enactment of 33 Stat. 565 (1904), was to remove the Puyallup Reservation from its status as "Indian Country" (Res. Br. 42). This is an attempt to stretch the stated Congressional intent far beyond its purpose. The only purpose of this Congressional enactment was to remove the ten year trust provision so as to allow immediate patents to issue.

United States v. Celestine, 215 U.S. 278 (1909), was decided subsequent to the enactment of 33 Stat. 565 (1904). At page 287, this court quoted from the opinion of *Eels v. Ross*, 64 Fed. 417 (9th Cir. 1894), with ap-

proval. With specific reference to the Puyallup Reservation, it was indicated that the allotment of the land and the acquisition of citizenship by the Indians did not terminate the reservation.

The State cites *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (D.C. Ind. 1940), as authority for the proposition that when lands are sold by Indians pursuant to Act of Congress, there are no "retained" hunting or fishing rights by virtue of the treaty (Res. Br. 44). This case is discussed on page 41 of Petitioners' opening brief. As stated therein, the provisions in the treaties involved in that case are not so definite and specific in reserving the hunting and fishing rights as are the provisions of the Medicine Creek Treaty (A. 71). Also, it is indicated on page 427 of the *Marks* decision that the Department of Interior had made the necessary federal level political decision disclaiming any further responsibility over the tribe. In addition to these distinctions previously mentioned, both Congress and the Washington State Legislature have spoken with regard to these reserved rights subsequent to the date of the *Marks* decision.

The intent of Congress to reserve Indian hunting, trapping and fishing treaty rights has been expressed on numerous occasions and an example of such expression appears in 67 Stat. 588, 18 U.S.C.A. 1162 B which provides as follows:

"Nothing in this section shall . . . deprive any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The purpose of the General Allotment Act is discussed

in a recent book, *The Indian America's Unfinished Business*, compiled by William A. Brophy and Sophie D. Aberle, University of Oklahoma Press, 1966, Library of Congress Catalog Card Number: 66-16528. This book is the final report of the investigation of the Commission on the Rights, Liberties, and Responsibilities of the American Indian, formed pursuant to the intent of the Eighty-third Congress as set forth in House Concurrent Resolution 108. On page 19, the purpose is stated as follows:

"The General Allotment Act was based on the theory that an Indian who possessed his own plat would automatically thereby become a farmer or livestock operator. Contact with whites and ownership of land were expected to teach him to become educated, civilized, and self-supporting — like his neighbors — thus relieving the government of further supervision and also throwing open large quantities of surplus land to non-Indians. Some allotments had been made earlier under treaties or laws, but the Act of 1887 subdivided land on a wholesale basis.

"The farmers sadly misjudged the nature of the Indian. He was not familiar with private ownership or farming. Unfortunately, there was no provision for training him in agriculture or for granting him credit for livestock, feed, and implements. However, the 'Surplus' land and many of the allotments passed into the hands of the whites.

"In 1934 when the process of allotting stopped, 246,569 assignments totaling nearly forty-one million acres had been made. The Meriam Survey Report in 1928, however, caused a slowdown of the parceling; and in 1934 the Indian Reorganization Act prohibited it altogether. This measure prolonged the trust period of allotments on reservations whose members accepted the Act, while an executive order extended the periods of other allotments.

"Under the operation of the law of 1887, tribal landholdings were cut from approximately 138,000,-

000 acres to roughly 48,000,000 in 1934. This reduction provides one reason for the Indian's present impoverishment and shattered morale." (Footnotes omitted.)

It was never the purpose of any of the allotment acts to terminate an Indian reservation. Nor was it a purpose to acquire, terminate or affect the Indian hunting and fishing rights reserved by Treaty. It is important to recognize that by the allotment of the land, each Indian became the owner of a separate parcel and the land thus allotted was removed from tribal communal ownership. Fishing rights, however, remained and still do remain in tribal communal ownership. *United States v. Winans*, 198 U. S. 371 (1905), recognizes this distinction. It points out that the Yakima Indians held an easement to go across land that had previously been allotted and patented in order to reach their usual fishing grounds which are held in tribal communal ownership.

The *Klamath* and *Sanapaw* cases cited on page 45 of respondents' brief are clearly not in point, since they are cases arising after the Congressional enactment of termination acts.

Under the General Allotment Act of February 8, 1887, 24 Stat. 388, Section 5, provides that title in trust to allotments must be held by the United States for 25 years. In 1893 Congress passed an act, 27 Stat. 612, 633-as follows:

"To enable the Secretary of the Interior, in his discretion, to negotiate with any Indians for the surrender of portions of their respective reservations; any agreement thus negotiated being subject to subsequent ratification by Congress, fifteen thousand dollars, or so much thereof as may be necessary."

The statute authorized the Commission to sell such portions as are not required for homes. The ten (10) year provision of said statute applies to such parcels as were sold. There has been no law that terminates the 25-year trust period. The position of the Puyallup Indian Tribe is that the reasoning of *Goudy v. Meath*, 203 U.S. 146 (1906), is inconsistent with the Medicine Creek Treaty and the General Allotment Act. Regardless of interpretation given the *Goudy* case, the fishing right being a communal right cannot be affected by allotment of land.

Between 1854 to 1929, as reflected in the records of the U.S. General Accounting Office, approximately One Million Dollars from funds of the Tribe was used for subsistence and maintenance of the Puyallup Indian Reservation.

3. The "Reasonable and Necessary" Test of the Court Below Means Total Prohibition of Indian Treaty Fishing Rights in the State of Washington

The Indian petitioners contend that there is something inconsistent with an opinion which holds that the members of the Puyallup Indian Tribe have a special Treaty right to net fish but results in their not being entitled to net even one fish in the exercise of that right.

The source of this inconsistency appears to derive from a breakdown in understanding as to what is meant by "regulation" and "reasonable and necessary" or words of similar import used in the opinion of the court below. It is submitted that most learned reasonable persons would understand these words so often used in equity to connote that a right could be exercised *partially* but not unreasonably or in complete disregard for the rights of others. The court below made no attempt to explain its use of the words "reasonable and necessary" or "regulation" used by it in reference to the admitted special fishing rights of Indian petitioners, as such explanation in the State of Washington

and the Pacific Northwest is apparently unnecessary. The trial court in compliance with the remittur from the court below immediately issued an absolute permanent injunction against any further exercise of Treaty fishing rights by petitioners in the Puyallup River Watershed and Commencement Bay (A. 69). That the respondent state departments interpret the words "reasonable and necessary" to mean absolute prohibition also is indicated by their usage of the term in their brief before this court.

On Page 53 of their brief respondents point out in conclusion that

"The 'reasonable and necessary' standard adopted by the court below affords the Indians a special right and yet gives the fishery resource a means of being protected and preserved from destructive fishing practices."

On Page 39 of their brief respondent's answer to a supposed inquiry of petitioners and the United States government as to whether it is permissible to allow some net fishing by petitioners under this "reasonable and necessary" test is an emphatic *no*.

Petitioners submit that the basic reason why the "reasonable and necessary" test is unworkable is that it is too vague to follow and sets no standard. Without the protection of some certain standard within which the fishing rights of petitioners may be exercised, the Indian petitioners' rights in this regard will be abolished by respondents and State of Washington courts.

4. Respondent Departments Are Incapable of Impartially "Regulating" Petitioner's Fishing Rights and "Regulation" by Them Means Total Prohibition

The opinion of the court below and its interpretation by the trial court and the respondent departments is illustra-

tive of why respondents cannot be allowed to regulate the exercise of petitioners' Treaty reserved fishing rights if petitioners are to have any Treaty fishing rights whatsoever.

The reasons for this are three-fold.

(a) The commercial fishing industry in the State of Washington is a sick industry. Its illness may be diagnosed as malnutrition stemming from insufficient fish to supply a tremendous growth in the number of fishermen and the efficiency of the boats and nets used. Although the fish supply has increased in both number and size of fish, it has not nor can it in the future keep pace with the increase in number of fishermen and gear. Several schemes by way of remedy have been advanced in the State of Washington but to no avail.⁵ This industry has brought pressure upon the respondent department of fisheries to supply more and more fish to satisfy an insatiable appetite. The extent of this pressure is not only evidenced by the attempt here to deprive the Indian petitioners of the few fish which represent their livelihood but by the fact the respondent department of fisheries has found it necessary to allow steelhead trout to be netted commercially in waters bordering the State of Washington despite the protests registered by the respondent department of game against the commercial netting of thousands of these game fish. In light of this pressure it would not appear respondents could possibly act as an impartial arbiter of the relative rights of the commercial and sports fishermen as against the minority group of Indians' rights to these fish.

5. See "Salmon Gear Limitation in Northern Puget Sound Waters," a portion of which is quoted in Appendix of this reply brief.

(b) The value of the few fish taken by the petitioners does not justify the expenditure of funds by them for fisheries research or observation and petitioners have no way of questioning any claim, statistics or expert opinion advanced by respondents to justify prohibition of their fishing right.

(c) Petitioners are helpless to withstand an attack by respondents and their experts against the exercise of their Treaty reserved fishing rights. All the fish biologists, experts, statisticians, enforcement officers, and observers are either directly or indirectly employed or paid by respondent departments or their mutual employer, the State of Washington. Every witness called by respondents would be classified in any court of law as "interested" witnesses. Respondents remark on page 39 of their brief that "petitioners produced not a single witness to challenge respondents' evidence." Petitioners submit that they could not at the trial nor could they in the future produce a single "uninterested" expert witness to testify for the simple reason that there are none. All the experts belong to or are beholden to respondents in one capacity or another. Respondents will always have an abundance of expert interested witnesses to testify that the taking of even one fish by petitioners must be prohibited. Petitioners further submit that the fact all expert witnesses are in the employ of respondent departments or their mutual employer the State of Washington should not result in the abrogation of their reserved Treaty fishing right.

SUGGESTED SOLUTION

It is the position of the petitioners herein that the term "conservation" and the term "reasonable and necessary" as

used by the respondent, State of Washington herein, means totally prohibiting any type of commercial fishing by the Puyallup Indian Tribe. Obviously, for this reason the petitioners nor can other Indian tribe in the State of Washington, Oregon or Idaho permit the State to regulate. The petitioners submit the following possible solutions:

(1) Apply the "indispensable standard" as set forth in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, (1963) printed at A. 201 through A. 209, be made applicable to the instant case. The "indispensable" test would give assurance to petitioners that respondents would regulate the commercial and sports fisheries so that enough fish would be permitted to escape their nets and enter the Puyallup River to allow the petitioners the right to catch adequate fish so necessary for their existence and way of life without endangering "brood stock." This has not worked in the past because the State of Washington has refused to be bound by the "indispensable" test as set forth by the 9th Circuit.

(2) The Court adopt the ruling of the majority Court in *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957).

CONCLUSION

In conclusion the petitioners request that the court give full force and effect to the intent of the Medicine Creek Treaty reserving to the Puyallup Indians their treaty fishing rights free from the State's regulation which have prohibited their Indian fisheries.

Respectfully submitted,

ARTHUR KNODEL
Attorney for Petitioners

APPENDIX A

**Salmon Gear Limitation
in Northern Washington Waters**

University of Washington Publication in Fisheries

ABSTRACT

The excess fishing gear used to harvest the salmon resource of northern Puget Sound and the Strait of Juan de Fuca has endangered the conservation of the salmon runs and greatly reduced the earnings of the men and vessels engaged. The International Pacific Salmon Fisheries Commission has officially requested that the gear be reduced, but it lacks the power to require its reduction.

This study is the result of a request by the Governor's Fishery Advisory Committee and the Legislative Interim Committee on Fisheries to the University of Washington. The study has been organized in three main parts: (a) Biostatistical analyses of the catches to determine the amount by which the gear can be reduced and the runs still harvested; (b) Economic studies to determine the recent earnings of men and vessels and to estimate the effect on earnings of a reduction in gear; and (c) Legal studies to determine whether a legislatively-prescribed scheme for restricting the number of units of gear fishing would be valid.

The findings are:

1. The number of units of fishing gear can be reduced to two-thirds the recent amount, and all runs can be fully harvested. The number might be reduced to as little as one-half the recent amount with no effect on the full harvest of any except very large runs.

2. The recent earnings of all three major types of gear are severely depressed despite record or near-record runs of the most valuable species, the sockeye.

3. If the number of units of fishing gear were reduced to two-thirds the recent number, the additional income to boat owners and fishermen would range from \$700,000 to \$2,500,000 annually, depending on the size and composition of the run.

4. Any further increase in the numbers of units fishing or decrease in the size of the runs will cause more severe economic loss.

5. Conservation regulations can be more precise with fewer units of fishing gear and the runs will be subject to less risk of overfishing.

6. Broadly speaking, if legislation to limit the number of fishermen is enacted, it would seem likely to withstand challenge based on the constitutional concepts of due process and equal protection, for the following basic requirements would be met; The legislature has proceeded upon some basis in fact; it has made a rational determination that some benefit to the general welfare of the people would be served by the legislation; and, further, it has made a rational choice of means to accomplish that benefit. Such legislation should not, nor is it contemplated that it would, discriminate against nonresidents of the state. As to specific provisions of such legislation, the conclusion is drawn that a grandfather clause would be valid, but other details have been examined cursorily or not at all, since the detail of proposed legislation has not been determined.

Recommendations are made for specific steps to reduce the number of units of fishing gear.

I. Introduction

Many people around the world who have studied trends in fish populations and who have been concerned with fisheries conservation have become alarmed at man's tendency to destroy the fish stocks. Every stock can produce a maximum sustained yield, but when this is temporarily exceeded, the future generations of fish and men must suffer. As the men fish harder and harder, the fish stock can produce less and less because we have no way of augmenting the stock, but must harvest merely what God has provided.

Michael Graham, who was long the director of the principal fisheries laboratory in Great Britain, stated his "Great Law of Fishing."* He stated this simply as "fish-

*Graham, Michael, 1949, *The Fish Gate*, Taber and Faber, Limited. London. 199 pp. Chapter 13.

eries that are unlimited become unprofitable" and he stated further that as the fishing effort increases the fisheries stay unprofitable and the fish stocks tend to die out. A series of studies by professional economists in recent years reinforces this conclusion. Fisheries with free entry invariably produce low incomes and poor efficiency, and there is no automatic tendency to correct these undesirable results.

This problem of excess fishing effort has plagued fishermen and those concerned with the conservation of fish in Washington for many years. It has recently become a much more urgent problem as people realized that they had had years of near-record salmon production that were yielding little if any profit to the salmon fishermen. The runs of sockeye salmon have been increased to near-record sizes, yet there has been no increase in benefits to the fishermen, the processors, or the public.

The International Pacific Salmon Fisheries Commission has long been concerned with the problem of excess fishing effort, and on December 18, 1957, its chairman sent the following letter:

December 18, 1957

Mr. W. C. Herrington
Special Assistant the Under Secretary
Department of State
Washington 25, D.C.

Dear Mr. Harrington:

The International Pacific Salmon Fisheries Commission has reported to the United States Government on several occasions that the recent rapid increase in the gear efficiency and units of fishing gear in United States Convention waters has created a situation which make the fulfillment of our terms of reference extremely difficult.

Since 1951 the development of nylon gill nets has increased the efficiency of this gear by an estimated 50 per cent resulting in a rapid growth of the gill net fleet. In 1957, 637 gill nets fished sockeye as compared with 322 gill nets the preceding brood year cycle and only 46 in 1945 the third preceding cycle. The 1956 gill net fleet comprised 491 boats compared with 192 the previous brood year cycle and 55 boats in the third preceding

brood year cycle in 1944. The other two year cycles of sockeye runs in 1955 and 1954 show similar growth in gill net fishing activity.

The number of purse seine boats have not shown such a phenomenal increase but there has been a gradual increase of roughly 50 per cent in fleet size over the last twelve years. In addition to the increase in fleet size the drum seiner and the power block have been developed and perfected since 1950. The drum seiner is able to make twice the number of sets per day as made by the original conventional seiner. The power block has increased the number of sets made by making fishing easier and in general has increased the efficiency of this type of operation by an estimated 18 per cent or more.

Under the Sockeye Fisheries Convention the only action the Commission can take to offset the effects of the rapid increase in fishing efficiency and fleet size is to reduce fishing time. Our action in this regard has now become so stringent and the weekly closed period so long that we are unable to analyze the runs of sockeye in such a manner that proper racial escapement and equal division of the catch as required between the fishermen of the United States and Canada can be guaranteed. The fishing industry is likewise faced with uneconomic operations arising out of the allowable short fishing weeks.

Article V of the Sockeye Fisheries Convention prescribes in part as follows: "Whenever, . . . the taking of sockeye salmon in waters of the United States of America . . . is not prohibited under an order adopted by the Commission, any fishing gear or appliance authorized by the State of Washington may be used in the United States of America by any person thereunto authorized by the State of Washington" The Commission is in complete accord with this provision but in view of our serious difficulties brought about by the rapid increase in fishing fleet size and gear efficiency we ask that the United States Government transmit a statement of our current problem to the State of Washington; further that we believe it desirable in the interest of good management that a regulatory formula be designed by and satisfactory to the State of Washington which will reduce fishing efficiency in the

United States Convention waters by a minimum of 25 per cent effective if possible prior to the 1959 fishing season.

In making this recommendation the Commission recognizes that a similar problem exists in other major fishing areas of the Pacific Coast of North America and that attempts to control fleet size and gear efficiency have not been entirely successful to date. We do, however, believe that the State of Washington will, upon receipt of our recommendations, take such action as it deems most desirable in an attempt to correct a very serious and difficult situation.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ T. Reid

Senator Thomas Reid

Chairman

The problem was also stated forcefully by Mr. DeWitt Gilbert, a more recent chairman of the Salmon Commission, at the Commission's meeting in Bellingham on December 19, 1961, and I quote:

Now let's consider some of our problems. One of them is high-lighted by the fact that the industry generally considers 1961 a disastrous season, despite the fact that it yielded the third largest pack made on this cycle since 1917.

What is wrong when third-best in 11 cycle years is a "disaster"?

Why do many purse seiners of both fleets report they failed to make expenses? Why do all types of gear fishing around Point Roberts report consistently declining returns? Why do Fraser River gillnetters say they are catching fewer fish than formerly?

The answer, plainly, lies in over-development of the fishery.

For years the Commission has reported to the two Governments, and to the industry, that increasing gear efficiency, increasing fishing effort and expanded fishing areas are making it most difficult for the Commission to fulfill its management responsibilities.

This over-development is not alone a matter of *numbers* of boats and nets, although that is important.

Other factors concern area of operations and efficiency of gear. Within the past 10 years the Canadian side of Juan de Fuca Strait has become a major fishing area. . . . The Power Block has doubled or tripled the number of sets a seiner can make in a day. . . . Drum seine gear permits a boat to make as many as 15 sets a day. . . . Synthetic fiber gill nets are universally used, and they have about twice the fish-catching ability of linen nets. . . . Mobility of the fleet, increasing with speed and power, permits high-speed craft to shift between areas, defeating efforts at effective administration.

Further, the fishermen get smarter, about the ways of the fish, and the methods of fishing.

To secure an escapement in the face of the increased intensity and efficiency of fishing effort, the Commission has been forced to reduce fishing time. Even with the drastic measures applied on the Early Stuart run in 1961, when the Strait was closed completely and the other major areas averaged less than three days per week, the actual escapement was less than 20 per cent of the run.

If the fishery had operated in the Strait, and the other areas had been on a two-day-a-week basis, it is doubtful if we could have secured the minimum 20 per cent escapement.

Essentially, the Commission is not concerned with the type of gear which may be operated in Convention waters. That primarily is a governmental responsibility.

However, we do have the responsibility of regulating the operation of that gear in order that (1) the sockeye and pink salmon resource of the Fraser River may be conserved and increased; and (2) that the allowable surplus above the needs of such conservation and growth be

divided equally between the fishermen of the two nations.

So we are seriously concerned with the problem of increased development of the fishery when:

1. Fishing time must be reduced to the point where it is almost impossible for the staff to measure the timing and abundance of the runs.
2. Gear is so abundant and efficient that each fishery in several different areas spread over 200 marine miles is taking virtually *all* of the fish in any area while the gear is being operated.
3. Large sections of the fleet become resentful of necessary increase in restrictions because of declining individual boat earnings, in spite of favorable total catches.
4. Gear competition and reduced earnings per boat threaten eliminations of certain forms of gear to the point where division of allowable catch between the national fleets might not be possible.

TABLE 1. RELATIVE GEAR EFFICIENCY TABLE
(IN NUMBERS OF GILL NET UNITS)

Area	Gear	Sockeye	Pink	Silver	Chum
1	Purse seines	8.0	13.0	4.0	4.0
2	Purse seines	8.0	9.0	2.0	3.8
	Reef nets	2.5	2.0	1.0	1.2
3	Purse seines	5.0	11.0	3.5	3.8
4	Purse seines	12.8	2.0	2.5

Gill net efficiency equals 1:0 in all cases.

Data have been rounded for uniformity in the table. Most efficiencies rounded exactly to units do not have accuracy to tenths.

JUN 20 1968

MINNIE L. LINDS, CLERK

IN THE
Supreme Court of the United States

October Term 1967

No. 247

THE PUYALLUP TRIBE, A Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF
WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington
PETITION FOR REHEARING

ARTHUR KNODEL,
Counsel for Petitioner
5505 20th Street East
Tacoma, Washington 98424

ARTHUR KNODEL,
Counsel of Record,
5505 20th Street East
Tacoma, Washington 98424

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To The Supreme Court of the State of Washington
PETITION FOR REHEARING

PUYALLUP TRIBE, the Petitioner above named, presents this, its petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I

The Court states that this case is of public importance. It is the position of the Petitioners that the small wealthy minority group consisting of sportsmen and commercial interest are acting under the pretense of public interest in attempting to usurp from the Indians their fishing right. The Indian

rights are owned legally through aboriginal ownership as well as treaty ownership. It is a well established fact that the average citizen cannot afford the expense of fishing gear and equipment that it takes to participate in commercial or sports fishing.

II

The Court, in its opinion, has clearly failed to apply the rule that any Indian Treaty right that has been reserved by Federal Treaty may be exercised by that tribe within their reservation boundaries without restriction. This rule has been so well accepted that at one time of oral argument before the United States Supreme Court the Respondents conceded this rule of law. It is the contention of the Petitioners that once the original boundaries of the Puyallup Indian Reservation were surveyed and staked out pursuant to Article II and VI of the Treaty of Medicine Creek and as enlarged by executive order of January 20, 1857 and September 6, 1873, those surveyed and staked out boundaries set the limits within which certain property rights and activities provided for in the treaty (including the on reservation fishing rights) could thereafter be exercised under exclusive tribal supervision, and the alienation of land pursuant to federal allotment acts had no effect upon those boundaries as to those rights and activities that do not depend upon actual Tribal ownership of land. *Moore v. United States*, 157 Fed. 2d 760 (1946); *United States v. Winans*, 198 U.S. 371 (1905); *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930); Cohen, *Handbook of Federal Indian Law*,

pages 285, 286. We find further support for our position in the opinion of Mr. Justice Black as he expressed it in the case of *Seymour v. Superintendent*, 368 U.S. 351, 356-359, with which decision we fully agree.

III

The Court, in its opinion, has clearly failed to apply the intent of the signators of the Medicine Creek Treaty as to the fishing rights reserved by the Puyallup Indian Tribe in their usual and accustomed fishing grounds. The State, in the trial court, introduced in evidence the Minutes of the Medicine Creek Treaty stipulated to by both Respondent and Petitioners. The proceedings of the Medicine Creek Treaty conference makes no mention of the term "in common with other citizens". The exact wording of the proceedings in Article II is "the right of fishing at common and accustomed places is further secured to them." File Microcopies of Records in the National Archives: No. 5 Roll 26, Records of the Washington Superintendency of Indian Affairs, 1853-1874, Records relating to Treaties, December 7, 1854 - June 9, 1863, The National Archives, Washington: 1945.

The history of the Puyallup Indian Tribe indicates that immediately after the Medicine Creek Treaty Conference, dissatisfaction arose which caused considerable hostility between the various bands of Indians and the non-Indians bringing about warfare, which ultimately led to the Fox Island Conference of August 4, 1856 (Which conference was called pursuant to Article VI of the Medicine Creek Treaty),

at which time the Puyallup Indian Reservation was enlarged and at that time the remarks of Governor Stevens would again indicate the importance of the fishing rights in which he made the following statement:

"offering you for fishing privileges one half of the waters of the river and the sound, offering to protect you in your rights and also offering to educate your children."

Further evidence as to the importance of the fishing right to the Puyallup Indians is given in the report by M. T. Simmons Indian Agent in his report of June 30, 1858 to the Bureau of Indian Affairs wherein he states:

"the minor reserves, such as the Puyallups, Nisqually, Squaksin, were intended for farms, fishing stations, etc. for each particular tribe".

IV

Your Petitioner believes that this decision is subject to numerous interpretations and the State will interpret this in such a manner as to give the greatest possible fishing right to the commercial and sports group. This would require the Puyallup Indian Tribe to again defend its rights. The State has available to itself, large sums of tax-payer dollars, while the Indians have very little money and ultimately they are forcing the Indians into court, the Indians would be unable to defend because of lack of money and such will lose their valuable treaty fishing right.

The Petitioner does not believe that such fear is unfounded because the State of Washington ruling on this very tribe and on these very facts in 1957 in the

case of *State vs. Satiacum*, 50 Wn. 2d 524, 314 P. 2d 400 (1957) rendered a decision recognizing the Indian Treaty Fishing right. The Petitioners herein followed that decision, but the State of Washington refused to be bound thereby. Not only did the State of Washington refuse to be bound by their own case decision, but also refused to be bound by the 9th Circuit Court of Appeal decision of *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169 (C.A. 9th, 1963). It is the contention of your Petitioners herein that the guidelines set forth in the *Umatilla* and *Satiacum* cases are guidelines that will protect the fishing rights of the Indians.

V

In 1875 Congress passed an act that provided for approval of allotments by the Secretary of the Interior. The Secretary of Interior under said Act was to issue patents in the name of the allottees, which patent had the effect and declared that the United States held the land allotted for a period of twenty-five years in trust for the sale, use and benefit of the Indians to whom such allotment shall have been made. In 1884, the Puyallup Tribe received 167 allotments. There were no other allotments issued within the Puyallup Reservation.

The three-man Commission was authorized to sell the surplus lands of the Puyallup Reservation. Milray points out there were some 23,000 acres belonging to the Puyallup Tribe. (A 193) The Bureau of Indian Affairs up to 1928 took from the Puyallup Tribe,

over One Million Dollars from the sale of this land for the subsistence of the Reservation.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Supreme Court of the State of Washington be reversed.

FRANK WRIGHT,

Chairman of Puyallup Indian Tribe.

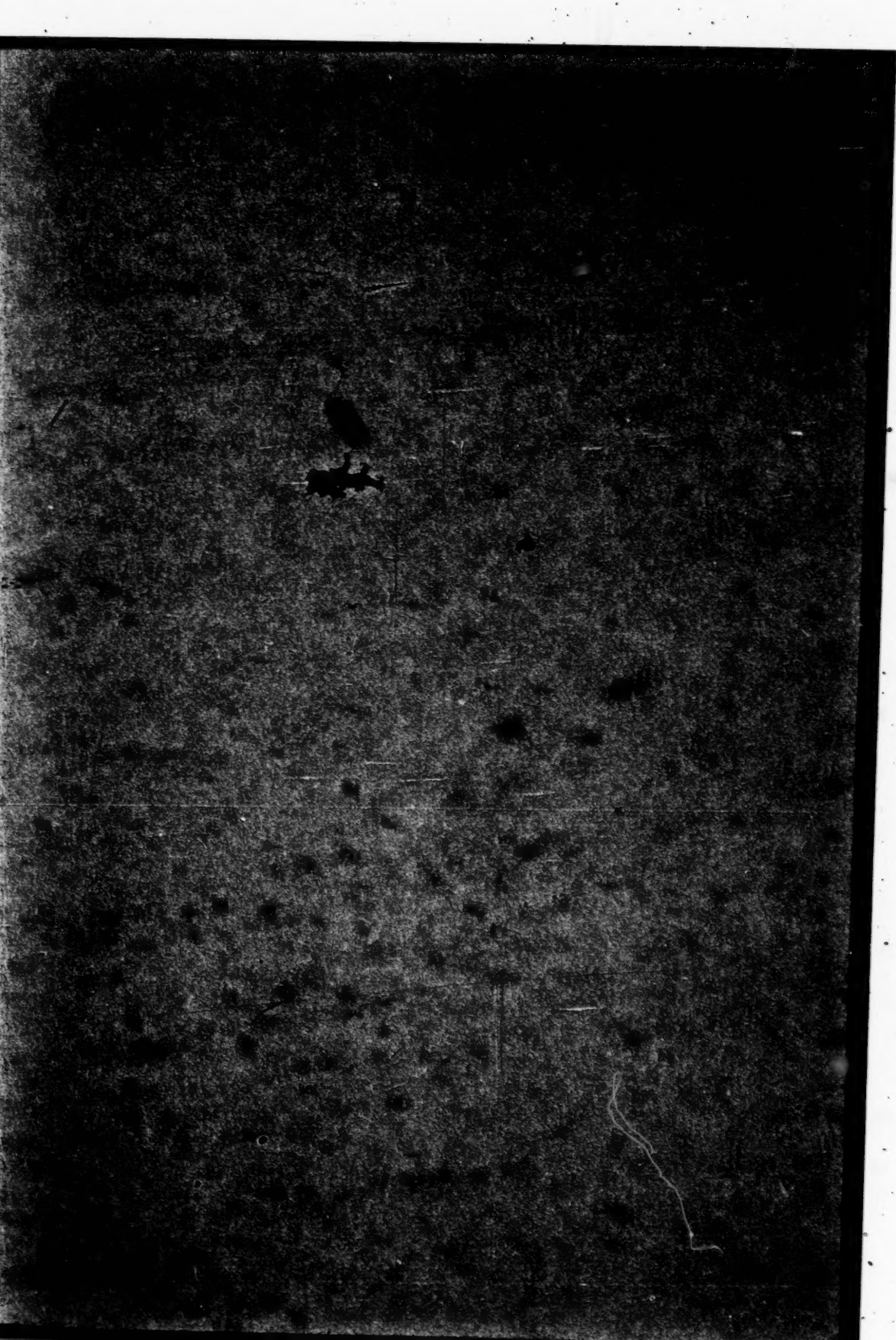
CERTIFICATE OF COUNSEL

The foregoing petition for rehearing was prepared under direction of the majority of the Puyallup Tribal Council and all issues, wording and reasons for the petition was at their request and instruction. That I, Arthur Knodel, prepared this petition for rehearing in the manner in which they directed. I certify that in my opinion this petition prepared by the majority of the Puyallup Tribal Council was prepared by them in good faith and not to delay.

ARTHUR KNODEL,

Attorney for Petitioners.

June 20, 1968.



FEB 5 1968

JOHN F. DAVIS, CLERK

APPENDIX

In the Supreme Court of the United States
OCTOBER TERM, 1967

No. 319

NUGENT KAUTZ, et al.,
PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF
WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON
Respondents

ON WRIT OF CERTIORARI TO THE WASHINGTON STATE
SUPREME COURT

PETITION FOR CERTIORARI FILED JUNE 30, 1967
CERTIORARI GRANTED DECEMBER 16, 1967



In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 319

**NUGENT KAUTZ, et al.,
PETITIONERS**

v.

**DEPARTMENT OF GAME OF THE STATE OF
WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON
Respondents**

**ON WRIT OF CERTIORARI TO THE WASHINGTON STATE
SUPREME COURT**

APPENDIX TO THE BRIEFS

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DOCKET ENTRIES

Before the Superior Court of the State of Washington
in and for the County of Pierce

January 22, 1964 Complaint.
February 9, 1965 Answer.
February 27, 1965 Motion and Affidavit to Dismiss.
June 23, 1965 Stipulation.
August 13, 1965 Findings of Fact and Conclusions
of Law:
August 13, 1965 Judgment and Decree.
September 8, 1965 Notice of Appeal.

Before the Supreme Court of the
State of Washington

January 12, 1967 Decision of the Supreme Court
of the State of Washington.
February 8, 1967 Petition for Rehearing.

Before the Supreme Court

June 30, 1967 Petition for a Writ of Certiorari
filed in the Supreme Court.
December 18, 1967 Order of the Supreme Court filed
granting the petition.

COMPLAINT

Come now the plaintiffs, by and through their Attorney General, John J. O'Connell, and Assistant Attorneys General, Joseph L. Coniff and Mike Johnston, and for a claim against the defendants, state as follows:

I

The State of Washington is a sovereign state of the United States, and that the Departments of Fisheries and Game thereof are charged with the duty of enforcing its laws, rules and regulations relating to the preservation, conservation, and management of the food and game fishery resources of the state.

II

The defendants are citizens of the State of Washington and of the United States of America.

III

The Nisqually River is a river that forms a portion of the southern boundary of Pierce County in the State of Washington that sustains a large anadromous fish population.

IV

The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River.

V

The defendants claim special privileges or immunities from the application of valid conservation laws

of the State of Washington, to which they are not legally entitled. By virtue of the claimed special privileges or immunities, the defendants have threatened and are fishing extensively in the Nisqually River with set nets and drift nets.

VI

As a result of the defendants' illegal net fishery, the anadromous fish runs of the Nisqually River will be virtually exterminated if said fishery is permitted to continue.

The plaintiffs have no adequate remedy at law and the public will suffer permanent irreparable injury from the acts of the defendants.

WHEREFORE plaintiffs pray that the court declare that the defendants are not entitled to any privileges or immunities from the application of state conservation measures;

FURTHER, the plaintiffs pray that a temporary restraining order be issued enjoining the defendants from netting anadromous fish in the Nisqually River or any of its tributaries and directing the defendants not to hamper or molest in any way the anadromous fish runs of the Nisqually River;

FURTHER, that the court fix a time certain at which the defendants shall show cause why they should not be enjoined and restrained during the pendency of this action from netting the runs of anadromous fish of the Nisqually River; and

FURTHER, that plaintiffs have judgment against the defendants permanently enjoining them from destroying the runs of anadromous fish of the Nisqually River system, and for such other relief as the court may deem just and reasonable.

ANSWER

Comes now the defendants and for answer to plaintiffs complaint admits and denies plaintiffs allegations as follows:

I

Answering Paragraph I of plaintiffs complaint the defendants admit the same.

II

Answering Paragraph II of plaintiffs complaint defendants admit that they are citizens of the United States, but deny that they are citizens of the State of Washington for all purposes.

III

Answering Paragraph III of plaintiffs complaint defendants admit the same.

IV

Answering Paragraph IV of plaintiffs complaint defendants have no knowledge of the allegations therein contained therefore deny the same.

V

Answering Paragraphs V and VI of plaintiff's complaint defendants deny the allegations therein contained.

WHEREFORE having fully answered the plaintiffs complaint the defendants pray that the same be dismissed.

MOTION AND AFFIDAVIT TO DISMISS

TO: STATE OF WASHINGTON and JOHN J. O'CONNELL, Attorney General.

Comes now Jack E. Tanner, attorney for the above named defendants and moves the court for an order of dismissal of the above entitled matter. This motion is based upon the grounds that Superior Court of Pierce County does not have jurisdiction over the persons or subject matter involved in this case.

/s/ **JACK E. TANNER**
Attorney for Defendants

STATE OF WASHINGTON, County of Pierce:

JACK E. TANNER, being first duly sworn upon oath, deposes and says:

That it is his information and belief that the defendants above named are descendants of the tribes, Puyallup and Nisqually, who were parties to the Medicine Creek Treaty of 1854, and as parties to that agreement between the United States and the Indian tribes the defendants claim all rights and privileges afforded to them by the Treaty which includes taking fish at all usual and accustomed grounds and stations on the Nisqually River.

JACK E. TANNER

STIPULATION

The following stipulation as to facts is entered into this 23rd day of June, 1965, between the plaintiffs and the individual defendants in the above-entitled action.

1) The defendants are successors in interest to the Nisqually Tribe of Indians which tribe is signatory to and entitled to rights under the Treaty of Medicine Creek (Kappler).

2) The boundaries of the Nisqually Indian Reservation are as shown on a map marked "Exhibit A" attached hereto and by reference incorporated herein.

3) The usual and accustomed fishing grounds (within the meaning of the Treaty of Medicine Creek, *supra*) of the Nisqually Tribe of Indians encompass the whole of the Nisqually River, and its tributaries downstream from the Nisqually Indian Reservation as described in Paragraph 2, above.

4) The defendants began engaging in an open net fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fishing conservation laws and regulations.

5) If permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.

6) The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn. 2d 423 (1963)] that the plaintiffs' enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SUPERIOR COURT

This case having come on for hearing before the undersigned Judge, sitting without a jury on a stipulated statement of facts on the 12th day of August, 1965, the plaintiffs being represented by John J. O'Connell, Attorney General, and Joseph L. Coniff and Mike Johnston, Assistant Attorneys General, and the defendants being represented by Jack Tanner, and the court having examined the stipulation of facts and heard the arguments of counsel and being fully advised in the premises, hereby makes the following Findings of Fact:

FINDINGS OF FACT

I

The defendants are successors in interest to the Nisqually Tribe of Indians which tribe is signatory to and entitled to rights under the Treaty of Medicine Creek (Kappler).

II

The boundaries of the Nisqually Indian Reservation are as shown on a map marked "Exhibit A" attached hereto and by reference incorporated herein.

III

The usual and accustomed fishing grounds (within the meaning of the Treaty of Medicine Creek, *supra*) of the Nisqually Tribe of Indians encompass the whole of the Nisqually River, and its tributaries downstream from the Nisqually Indian Reservation as described in Paragraph 2, above.

IV

The defendants began engaging in an open net fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fishing conservation laws and regulations.

V

If permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.

VI

The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn. 2d 423 (1963)] that the plaintiffs' enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.

FROM THE FINDINGS OF FACT, THE COURT
MAKES THE FOLLOWING CONCLUSIONS OF LAW:

I

It is reasonable and necessary that state conservation laws, rules and regulations be uniformly applied

to all citizens on an equal basis including the defendants.

II

That to permit the defendants to fish as they have done since 1960, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Nisqually River watershed.

III

That the defendants should be permanently enjoined from fishing in the Nisqually River, without the boundaries of the reservation, in any manner contrary to the laws, rules and regulations of the State of Washington.

DONE IN OPEN COURT THIS 13th day of August, 1965.

/s/ JOHN D. COCHRAN
Judge of the Superior Court

JUDGMENT AND DECREE OF THE SUPERIOR COURT

The above-entitled matter having come on regularly for trial and hearing on stipulated facts before the undersigned judge, sitting without a jury on the 13th day of August, 1965, the plaintiffs being represented by John J. O'Connell Attorney General, and Joseph L. Coniff and Mike Johnston, Assistant Attorneys General, and the defendants being represented by Jack E. Tanner and the court having examined the stipulation of facts and heard the arguments of counsel and being fully advised in the premises and having entered its Findings of Fact and Conclusions of Law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

The defendants are hereby permanently enjoined from fishing in the Nisqually River watershed, without the boundaries of the Nisqually Reservation as stipulated in the facts, in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That plaintiffs shall recover their costs and disbursements herein.

DONE IN OPEN COURT THIS 13th day of August, 1965.

/s/ JOHN D. COCHRAN
Judge of the Superior Court

DECISION OF THE SUPREME COURT

January 12, 1967

HILL, J.—This is an action by the Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, against 12 named individuals and a John Doe, all of whom it is alleged, "have threatened and are fishing extensively in the Nisqually River with set nets and drift nets," under a claim of special privileges or immunities from the conservation laws of the State of Washington.

The Departments alleged that if the defendants' net fishing was permitted to continue the anadromous fish¹ runs of the Nisqually River would be virtually exterminated.

The Departments sought a judgment, holding that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that they be restrained from netting anadromous fish in the Nisqually River or any of its tributaries.

The Nisqually Tribe² and the Puyallup Tribe, with numerous others, were signators to the Treaty of Medi-

¹For an understanding of an "anadromous" fish, see opinions by Judge Rosellini in *State v. McCoy*, 63 Wn.2d 421 at page 426 *et seq.*, 387 P.2d 942 (1963), and his concurring opinion in *State c. Satiacum*, 50 Wn.2d 513, 531 *et seq.*, 314 P.2d 400 (1957).

²The Nisqually Tribe was not made a defendant in this action. The trial court entered an order "that the Nisqually Indian Tribe be and is hereby joined as a party defendant to this cause and it is further ordered that they be so summoned." The only proof of being "summoned" is that a copy of the order was served on the wife of the chairman of the Nisqually Indian Community Council at his residence. The tribe never appeared; no default was ever entered.

cine Creek and entitled to certain rights thereunder, which rights have previously been discussed in the companion case (No. 38611) filed this day involving the Puyallup Tribe of Indians (70 W.D.2d 241, —P.2d—).

In this case, there is no question as to the continuation of the Nisqually Tribe or as to the existence of the Nisqually Indian Reservation.

It is stipulated that the defendants are Nisqually Indians and that "usual and accustomed fishing grounds"³ (within the meaning of the Treaty of Medicine Creek) encompass the whole of the Nisqually River and its tributaries downstream from the reservation.

It is stipulated further:

4) The defendants began engaging in an open net fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fishing conservation laws and regulations.

5) If permitted to continue, the defendants commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.

6) The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn.2d 423 (1963)] that the plaintiffs enforce state fishery

³The Medicine Creek Treaty refers to "all usual and accustomed fishing grounds and stations."

conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds. /

We have here the extreme case: It is stipulated that the "defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River"; that the enforcement of the conservation laws and regulations are necessary for the proper conservation of the salmon and steelhead fish runs; nevertheless, the defendants asserted in the trial court and assert here that their right to fish as they please is not subject to any interference by the Departments. They challenged the jurisdiction of the superior court to consider the cause of action and its right to restrict in any way their treaty rights.

The superior court held that it did have the jurisdiction to hear the matter and permanently enjoined the defendants⁴ from fishing in the Nisqually River watershed without the boundaries of the Nisqually Reservation in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Departments.

[1] We agree with the trial court that it did have jurisdiction to hear the cause and to enter its order. When Indians seek to enjoin claimed interference with their treaty rights, they usually invoke the jurisdiction of the federal courts, as did the Makah Tribe in the

⁴The state asserts in its brief (p. 4) that the Nisqually Tribe was joined as an additional party defendant and is bound by the injunction. See Note 2 for the only indication in the record that the tribe was made a party defendant. We do not pass upon the issue of whether the tribe is included in the defendants, who are enjoined.

*Schoettler*⁵ and *McCauley*⁶ cases, and the Confederated Tribes of the Umatilla Reservation in the *Maison*⁷ case.

When a state seeks to enforce its laws and the regulations made thereunder, in furtherance of its police power, to conserve its fish and game, it invokes the jurisdiction of the state courts as in the *Tulee*,⁸ *Becker*⁹ and *Race Horse*¹⁰ cases, and the claimed interference with treaty rights becomes a matter of defense.

The United States brought one action to enforce Indian treaty rights in our territorial court,¹¹ and another in the Circuit Court of the United States for the District of Washington.¹²

In the final analysis, irrespective of which route has been pursued—federal courts or territorial and state courts—the Supreme Court of the United States can be requested to determine the rights of the contesting parties, if an interpretation of a treaty between an Indian tribe and the United States is involved.

⁵*Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

⁶*McCauley v. Makah Indian Tribe*, 128 F.2d 867 (9th Cir. 1942).

⁷*Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

⁸*Tulee v. Washington*, 315 U. S. 681, 86 L. Ed. 1115, 62 Sup. Ct. 862 (1941).

⁹*New York ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. Ed. 1116, 36 Sup. Ct. 705 (1916).

¹⁰*Ward v. Race Horse*, 163 U. S. 504 (1896).

¹¹*United States v. Taylor*, 3 Wash. Terr. 88 (1887).

¹²*United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. 662 (1905).

We find nothing in any of the cases dealing with Indian treaty rights which would indicate that a state does not have jurisdiction over a violation of its conservation laws or the regulations issued thereunder by an Indian at a locus in quo within the state and outside a reservation. Should the state trial court and this court fail to properly interpret the off-reservation treaty rights of an Indian, the Supreme Court of the United States is available for a final determination. A state court has the right to be wrong in such a case, and we find no support for the challenge of the defendants to the jurisdiction of the superior court.

We have considered in the companion *Puyallup* case, *supra*, the extent of the rights of Indians to fish at "all usual and accustomed grounds and stations," accorded them by the various treaties, and have concluded that their off-reservation fishing rights are—together with those of other citizens of the state—subject to regulations necessary for the preservation of the fishery. Repetition of that discussion would seem to be unnecessary.

The defendants having stipulated that their commercial fishing, if permitted to continue, would virtually exterminate the salmon and steelhead fish runs; and that the enforcement of the regulations of the Department is necessary for proper conservation of the salmon and steelhead fish runs, it would follow that their fishing in violation of those regulations should be enjoined.

Apparently the reason for an appeal, in the face of such stipulations, is to raise the jurisdictional issue (already disposed of) and the issue raised by the language in the opinion in *Maison v. Confederated Tribes of the Umatilla Indian Reservation* (see note 7), which

would place upon the state the burden of showing that its particular regulation or regulations limiting the off-reservation fishing rights reserved by the treaties¹³ must be "indispensable" to accomplish the purpose for which they are intended — the preservation of the fishery.

We have, in the *Puyallup* case, *supra*, indicated our disagreement with the "indispensable" test and our adherence to the "reasonable and necessary" test, as stated in *State v. McCoy* (see note 1).

While we agree that under the stipulation an injunction was proper, it should not be permanent. The stipulation was not that *all future* state conservation laws and regulations will be necessary for the proper conservation of the salmon and steelhead fish runs, and the injunction should apply only to violations of the statutes and regulations stipulated to be presently necessary to the conservation of the salmon and steelhead fish runs on the Nisqually River. In view of the scope of the stipulations, the tailoring of the injunction to meet a specific situation, as in the *Puyallup* case, *supra*, is not necessary.

The cause will be remanded to the superior court for a proper limitation of the injunction. The respondents will recover their costs on this appeal, the remand not being on any issue raised by the appellants.

¹³Whether the off-reservation fishing rights are reserved to the Indians by the treaty, or granted to them by the treaty, may become of importance. Our own Territorial Supreme Court (see Note 11) in an opinion written by Associate Justice John P. Hoyt in 1887, held that they were reserved rights; and the Supreme Court of the United States expressed the same view in *United States v. Winans* (see note 12).

FINLEY, C. J., WEAVER and HAMILTON, J., and
LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—This case involves the treaty rights of the appellant Nisqually Indians to fish at the usual and accustomed fishing grounds and stations under the Treaty of Medicine Creek.

I agree with the majority in holding that the trial court had jurisdiction of this controversy, but I do not agree with the majority's disposition of this case for the reasons stated by me in the companion case (No. 38611) involving the Puyallup Tribe (70 W.D.2d 241).

In the instant case, appellants have stipulated to the facts quoted in the majority opinion. It seems ironic that appellants in this case have thus admitted facts which, in my opinion, the respondent state departments were unable to prove by a preponderance of the evidence in the *Puyallup* case.

Nevertheless, I would reverse the trial court's injunctive decree and direct that the action be dismissed for the three reasons which I stated in the *Puyallup* cases. Even with the facts admitted in the stipulation, the reasons which I discussed therein are still applicable to the present case.

The majority opinion states that, if this court fails to interpret correctly appellants' treaty rights to fish off the reservation, the United States Supreme Court is available for a final determination of the case. This is theoretically true, but we should not overlook the fact that the Supreme Court has twice declined to review either of two cases (one from a state supreme court and one from a United States court of appeals) in which the constitutional status of a similar Indian treaty was brought into question.

See *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), in which certiorari was denied 347 U. S. 937, 98 L. Ed. 1087, 74 Sup. Ct. 627 (1954), and *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), in which certiorari was denied 375 U. S. 829, 11 L. Ed. 2d 60, 84 Sup. Ct. 73 (1963).

Nevertheless, the important questions involved in the present two companion cases would seem to justify an authoritative determination of the constitutional status of these Indian treaties by the only tribunal competent to finally decide them.

HUNTER, J. (dissenting)—I dissent to the modification of the trial court's injunction for the same reasons stated in my dissent to *Department of Game v. Puyallup Tribe*, 70 W.D.2d 241, —P.2d— (1967).

ROSELLINI and HALE, J., concur with HUNTER, J.

FEB 27 1967

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1967

No. 319

Nugent Kautz, et al.,
Petitioners

v

Department of Game of the State of
Washington
and the

Department of Fisheries of the
State of Washington
Respondents

On Writ of Certiorari to the Washington State
Supreme Court

BRIEF OF PETITIONERS

JACK E. TANNER,

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OPINIONS IN THE COURTS BELOW

On January 12, 1967, the Supreme Court of the State of Washington in the case of the Department of Game et. al., Respondents vs. Nugent Kautz, et. al., Appellants 70 Wd. 2nd, 270 (A11-18) upheld the decision of the Superior Court of Pierce County, Washington, rendered on August 13, 1965. The decision of August 13, 1965, by the Superior Court of Pierce

County (A10) permanently enjoined the Petitioners from fishing in the Nisqually River water shed in a manner contrary to the statutes of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington (A11).

STATEMENT OF GROUNDS AS TO JURISDICTION

The Petitioners submit that the Supreme Court of the United States does have jurisdiction in this matter, and that substantial federal questions as to Indian Treaties are involved in this case. The jurisdiction of this court is invoked under Article VI, Section 2 of the United States Constitution; the Treaty of Medicine Creek of 1854; 10 stat. 1132; Public Law 280, stat. 588; all of which involve Indian Treaties and Indian jurisdiction; and the XIV Amendment of the United States Constitution, Section 1, (See appendices A, B and C). That the Petitioners as "Treaty Indians" are entitled to the protection of this court as to their privileges and immunities "and as to the equal protection of the law" guaranteed by the XIV Amendment, Section 1 of the United States Constitution.

That jurisdiction of the Superior Court of Pierce County was challenged by the Petitioners in the lower court (A5), and was again challenged in the Supreme Court of the State of Washington. That the Challenge to jurisdiction was considered, discussed, and denied in the trial court (A10) and again in the Supreme Court of the State of Washington (A13).

QUESTIONS PRESENTED

The questions presented for review are:

1. Does the State of Washington have jurisdiction over persons of the petitioners as they are successors in interest of the Nisqually Tribe of Indians who were signators to the Treaty of Medicine Creek of 1854?

2. Do the Courts of the State of Washington have jurisdiction over the subject matter of Article II of the Treaty of Medicine Creek; namely, "Indian fishing" at the usual and accustomed fishing grounds?

3. Can the State of Washington, acting through the Department of Game and the Department of Fisheries of the State of Washington, regulate and prohibit in any manner Petitioners who are claiming fishing rights at the "usual and accustomed fishing grounds" as beneficiaries of the Treaty of Medicine Creek?

STATEMENT OF THE CASE

On January 22, 1964, the Department of Game and the Department of Fisheries of the State of Washington, filed a complaint in the Superior Court of Pierce County, Washington, (A2) asking for a declaratory judgment against the Petitioners. The two State agencies were seeking an injunction preventing the Petitioners from fishing off the Indian reservation boundaries of the Nisqually River in any manner inconsistent with State statutes and regulations of State Departments of Game and Fish. In many court appearances, the Appellants denied the jurisdiction of the State of Washington over both the subject matter of the complaint; namely, "Indian fishing" on the Nisqually River and also as to the persons of the Petitioners.

Petitioners were then and are now claiming certain benefits as successors in interest of the signators to the Treaty of Medicine Creek.

That Superior Court of the State of Washington did grant a temporary restraining order preventing the Petitioners from fishing in any manner contrary to the State statutes and regulations of the State Departments of Game and Fish. That after a long period of time, both parties entered into a Stipulation of Fact (A6), and on August 13, 1965, the trial court entered Findings of Fact and Conclusions of Law, (A7, A8, and A9) and Judgment and Decree (A10) granting the State agencies a permanent injunction. Notice of Appeal was timely given on September 8, 1965.

The matter was then argued before the Supreme Court of the State of Washington which rendered its decision on January 12, 1967, upholding the decision of the trial court. The Petitioners then timely filed a petition for rehearing on February 8, 1967. The said petition was denied. On June 30, 1967, Petitioners herein, after receiving permission for an extension of time, filed a petition for a Writ of Certiorari to this court. This court granted the Writ on December 18, 1967.

ARGUMENT

The Petitioners submit that as beneficiaries of the members of the Nisqually Indian Tribe, signators to the Treaty of Medicine Creek of 1854, that they are entitled to fish under Article III at the "usual and accustomed fishing grounds," namely, the entire Nisqually River without interference by the State of Washington or interference by any other city, county or State agency. That they are entitled, as Treaty Indians, to

the protection of Article VI, Section 2 of the United States Constitution; the Treaty of Medicine Creek of 1854, 10 stat. 1132; Public Law 280, 67 stat. 588; and to those privileges and immunities and equal protection of the law of the XIV Amendment to the United States Constitution, Section 1.

That Public Law 280, specifically excludes State jurisdiction, by licensing or regulation, over Indian fishing under Federal Treaty.

That Article VI, Section 2 of the U. S. Constitution provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land", and anything in the Constitution or laws of any state to the contrary notwithstanding.

That the State of Washington at the time of the signing of the Treaty between the Federal Government and the various Indian tribes was not then a State, and is not a party to the Treaty, and therefore, has no jurisdiction as to either the subject matter of the Treaty nor as to the persons of the Petitioners and their fishing rights under the Treaty.

CONCLUSION

The Appellants vigorously disagree with the Supreme Court of the State of Washington as to its statement in the decision affirming the trial court's decision which states that:

"A state court has the right to be wrong (A15) in such a case."

Since Indian treaties are the supreme law of the land and, therefore, by definition exclude state interference, the State cannot then eliminate the State

action; namely, regulation and prohibition, the benefits enjoyed by the Petitioners as "Treaty Indians" who are fishing at the "usual and accustomed fishing grounds." The Appellants respectfully request that this court enter an order reversing the decision of the Supreme Court of the State of Washington, and then declare the Treaty of Medicine Creek as the supreme law of the land, and further that the Petitioners as "Treaty Indians" do have certain privileges and immunities without interference of any kind from the State of Washington or its sub-divisions as to their fishing at the "usual and accustomed fishing grounds" under Article III of the Treaty of Medicine Creek.

Respectfully submitted,

JACK E. TANNER,
Attorney for Petitioners.

APPENDIX A

Dec. 26, 1854

FRANKLIN PIERCE
PRESIDENT OF THE
UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

[Title.]

WHEREAS a treaty was made and concluded on the Sre-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the Shē-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Ste-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

[Cession to United States.]

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all of their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Duwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek; to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon Island, easterly and southeasterly, to the place of beginning.

[Reservation for said tribes; Removal thereto;
Roads may be constructed.]

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract contain-

ing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

[Rights to fish.]

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

[Payments for said cession; How applied.]

ARTICLE IV. In consideration for the above cession, the United States agree to pay to the said tribes

and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

[Expense of removal, &c.]

ARTICLE V. To enable the said Indians to remove and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to laid out and expended under the direction of the President, and in such manner as he shall approve.

[Removal from said reservation; Ante, p. 1044.]

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or

may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

[Annuities not to be taken for debts.]

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

[Stipulations respecting conduct of Indians.]

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of

the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

[Intemperance.]

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

[Schools, shops, &c.]

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with these of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agrees to employ a physician to reside at the said central

agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees and medical attendance to be defrayed by the United States, and not deducted from the annuities.

[Slaves to be freed.]

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

[Trade out of the limits of U. S. forbidden;
Foreign Indians not to reside on reservation.]

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

[Treaty, when to take effect.]

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS

[L. s.]

Governor and Superintendent Territory of Washington.

APPENDIX B?

ARTICLE VI, SECTION 2.— U. S. CONSTITUTION.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, and any thing in the Constitution or laws of any state to the contrary notwithstanding.

AMENDMENT XIV, SECTION 1 —
U. S. CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

APPENDIX C

Public Law 280

CHAPTER 505

August 15, 1953

[H. R. 1063]

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such states, and for other purposes.

[Indians; State jurisdiction over criminal offenses.]

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of

such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reserva- tion.
Wisconsin.....	All Indian country within the State, except the Menominee Reservation.

[Taxation of property, etc.]

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or, the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

[State jurisdiction over civil causes.]

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State, except the Menominee Reservation.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water right, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

[Repeal.]

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

[Removal of legal impediment.]

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil

and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

[Consent of U. S. to other States.]

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO. 319

NUGENT KAUTZ, ET AL.
Petitioners,

v.

**DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON AND THE
DEPARTMENT OF FISHERIES OF THE
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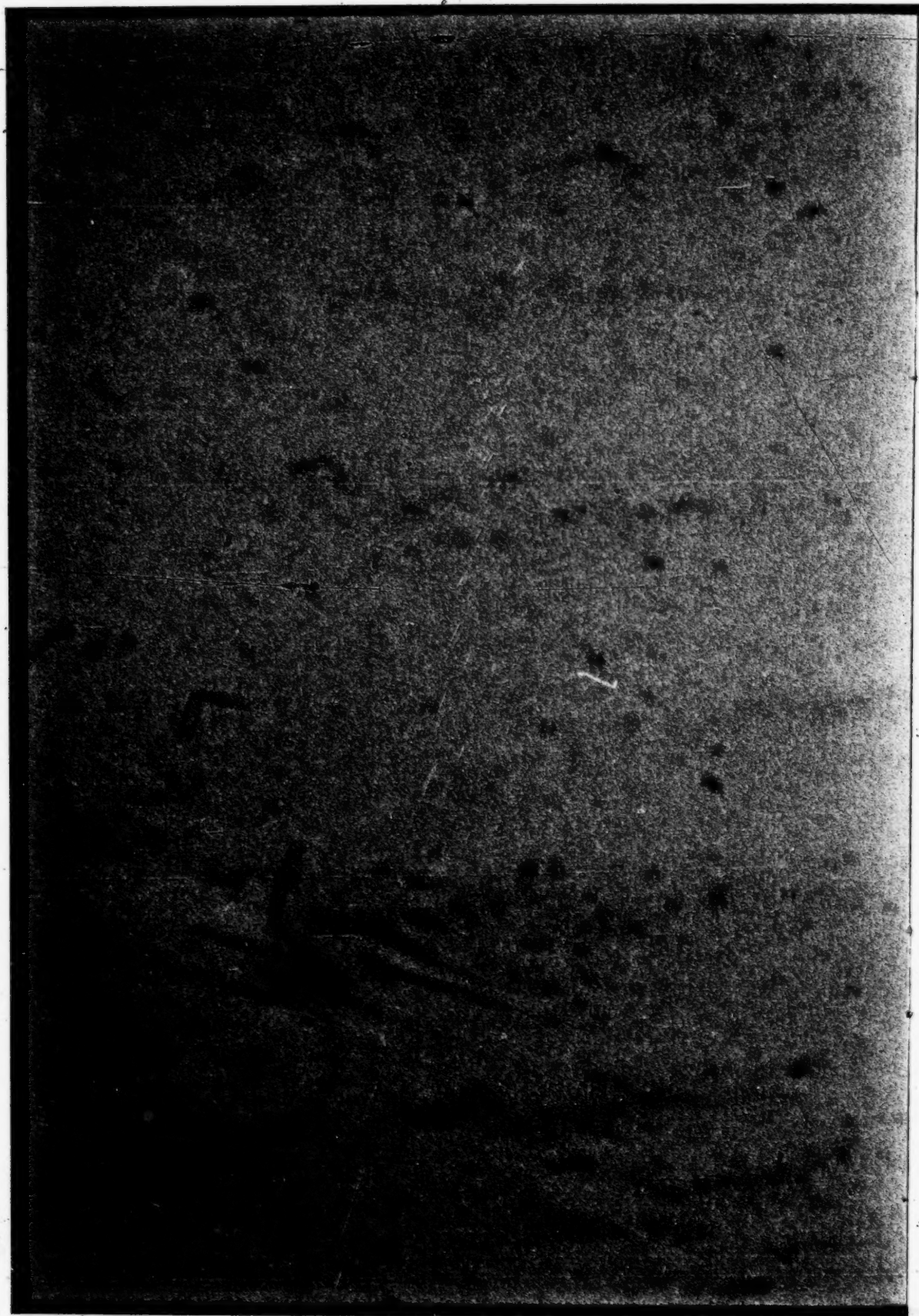
PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

**BRIEF AMICUS CURIAE ON BEHALF OF THE STATE
OF IDAHO FISH AND GAME DEPARTMENT URGING
GRANTING OF PETITIONERS' APPLICATION FOR
A WRIT OF CERTIORARI**

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR AMICUS CURIAE STATE OF IDAHO FISH
AND GAME DEPARTMENT IN SUPPORT

STATEMENT OF INTEREST

The State of Idaho through its Fish and Game Department, being represented by its Attorney General, pursuant to Rule 27, par. 9. (d), Revised Rules of the Supreme Court of the United States, urges the granting of petitioners' Application for a writ of certiorari to review the decree of the Supreme Court of the State of Washington in its opinion for the above-entitled case reported at 78 Wn. Decisions (2d) 270.

The Idaho Fish and Game Department is organized under Title 36 of the Idaho Code and has the

duty to preserve, protect, propagate and manage the fish and wildlife resources within the State of Idaho and in waters boundary thereto.

The State of Idaho supports a large anadromous fishery resource and a sizable portion of the State's economic structure is built around sport fishing by residents and non-residents for anadromous fish.

All anadromous fish migrating from the Pacific Ocean to their natal streams in Idaho must first ascend the Columbia River and then the Snake River where the same are subject to off-reservation fishing by Indians who are members of tribes located in Washington, Oregon and Idaho.

For the above and foregoing reasons the State of Idaho has long been concerned with the impact of the off-reservation Indian fishing, both commercial and non-commercial on the anadromous fishery resources of the States of Washington, Oregon and Idaho.

ARGUMENT

The State of Idaho submits that there is a present need for a review by the United States Supreme Court of the right of the State of Washington to impose reasonable and necessary regulations upon off-reservation Indian fishing, inasmuch as such a determination by this Court will also be determinative of the right of the State of Idaho to impose regulatory restrictions as are reasonable and necessary for the conservation of the fishery

resource upon Indians in Idaho who claim treaty off-reservation fishing rights under treaty provisions identical to or very similar to the provisions of the Treaty of Medicine Creek, 10 Stat. 1132.

CONCLUSION

For the foregoing reasons, the State of Idaho Fish and Game Department respectfully urges the court to grant petitioners' application for a writ of certiorari.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
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STATE OF WASHINGTON

BRIEF OF RESPONDENTS

JURISDICTION

The opinion of the Washington State Supreme Court was filed on January 12, 1967 (A. 11). The petition for Writ of Certiorari was filed on June 30, 1967, and was granted December 18, 1967. This court has jurisdiction under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Does Article 3 of the Treaty of Medicine Creek operate as a reservation of sovereign rights or immunities for the petitioners from the application of valid state conservation laws?

2. Does Public Law 280 (18 U.S.C. Section 1162(b)) deprive state courts of jurisdiction to hear controversies involving the interpretation of the "usual and accustomed" hunting and fishing provisions of the treaty?

THE TREATY AND STATUTES INVOLVED

The treaty involved is known as the Treaty of Medicine Creek, 10 Stat. 1132.

The statutes involved are those of the State of Washington concerning fishery resource conservation by regulation of the time, place and manner of fishing. Anadromous fish are the subject matter of this litigation. The conservation or management responsibilities for anadromous fish has been legislatively defined to include all species of salmon as food fish and steelhead trout as game fish¹. State laws most often violated by Indians claiming off-reserv-

¹The Department of Game has management responsibility for steelhead trout and the Department of Fisheries for salmon and shellfish. RCW Titles 75 and 77. Food Fish (i.e. salmon species) may be dealt with commercially while steelhead trout may not. Salmon may be taken with commercial gear (nets) in salt water under regulations promulgated by the Department of Fisheries. Steelhead trout may only be taken by hook and line under regulations promulgated by the Department of Game.

ation fishing rights are: Revised Code of Washington 75.12.060: (hereinafter referred to as RCW)

"It shall be unlawful to construct, install, use, operate, or maintain within any waters of the state any pound net, round haul net, lampira net, fish trap, fish wheel, scow fish wheel, set net, weir, or any fixed appliance for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means.";

RCW 75.12.280:

"It shall be unlawful for any person to install, use, operate, or maintain within any waters of the state any monofilament gill net webbing of any description for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means or with such gear."; and

RCW 77.16.060:

"It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: Provided, that persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of non-game fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment."

STATEMENT OF THE CASE

The Respondents in their complaint (A. 2) alleged that Petitioners claimed special privileges or immunities from the application of state conservation laws and regulations to which they were not entitled and that by virtue of these claims petitioners had extensively fished the Nisqually River with set nets and drift nets and if the illegal fishing continued, the anadromous fish runs in the river would be virtually exterminated.

Respondents asked the court to declare that petitioners had no special privileges or immunities from the application of state conservation laws and that they be enjoined from further violations of state law.

Petitioners answered (A. 4) and moved to dismiss the complaint alleging the court had no jurisdiction over the petitioners or the subject matter of the action (A. 5).

Thereafter, the parties stipulated (A.6) that petitioners were beneficiaries of the Treaty of Medicine Creek; were fishing at their usual and accustomed grounds, and that should their fishery continue, it would "virtually exterminate" the anadromous fishery resource in the Nisqually River.

It was further stipulated that it "was necessary for conservation of the salmon and steelhead runs of the Nisqually River" that respondents enforce the state's conservation laws and regulations (A. 6).

On the basis of the stipulation, after argument, the trial court entered Findings of Fact and Conclusions of Law incorporating the stipulation (A. 7-9) and permanently enjoined petitioners from violating state conservation laws, rules and regulations (A. 10).

There are no factual questions before this court, it being admitted by petitioners that their fishing practices would destroy the anadromous fishery resource of the Nisqually River watershed.

SUMMARY OF ARGUMENT

I. An Indian treaty operates as a grant of Right from the United States to the Indian tribe and therefore the "In Common With All Citizens of the Territory" phrase must be given literal effect.

Aboriginal use and occupancy, sometimes referred to as "aboriginal title", does not create a compensable property right in Indians under the 5th Amendment to the Constitution. Therefore, execution of a treaty with an Indian tribe does not operate as a recognition of any pre-existing right, but is a grant of right from the United States to the tribe. *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The right granted by the treaty to "fish in common with all citizens of the Territory" means that treaty Indians are possessed of only such rights as are all other citizens. The premise of *United States v. Winans*, 198 U.S. 371 (1905) that the treaty was

a recognition of "aboriginal title" is in error to this extent.

This conclusion is supported by the following language which appears in the treaty with the Yakima, 12 Stat. 951, in Article 3:

"... is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways."

Abstrud results on our streets and highways would obtain if the "in common" language were interpreted as a reservation of pre-existing sovereign right of the Indians as petitioners contend.

II. Assuming arguendo that treaty Indians possess special rights to fish outside their reservation boundaries, the "reasonable and necessary" test affords recognition of Indian rights and yet allows conservation of the anadromous fishery resource.

The test applied in the opinion below and in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963) is the same rationale used by this court in *Tulee v. Washington*, 315 U.S. 681 (1942).

It allows the state to prohibit certain types of fishing practices when it can show the resource is being endangered by net fishing at critical times in certain areas.

The "indispensability test" of *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) prohibits any conservation until the Indians have taken all but the last fish. It would effectively destroy the economic and

recreational value of the resource. The "indispensability" standard is not workable in terms of the conservation needs of the resource because it leaves an Indian commercial fishery, using modern nylon monofilament nets, subject to no meaningful management or control.

III. Public Law 280 does not operate as a congressional recognition of Indian fishing rights.

18 U.S.C. 1162(b) concerns only assumption of state jurisdiction over Indian reservations for particular purposes and specifically excludes any effect on Indian fishing. Congress has not purported to define the quantum of off-reservation fishing or hunting rights secured to Indian tribes under any treaty.

ARGUMENT

- I. *An Indian Treaty Operates As A Grant of Right From The United States To The Indian Tribe and Therefore The "In Common With All Citizens of The Territory" Phrase Must Be Given Literal Effect.*

The Constitution declares a treaty to be the supreme law of the land. U.S. Const., Art 6. There is no question that the federal government may limit a state's police power by treaty. *Missouri v. Holland*, 252 U.S. 416 (1920).

Treaties with the various Indian tribes of the United States are distinguishable from international agreements to which the United States is a party because they deal with citizen-nationals wholly within the geographical and jurisdictional limits of

the United States. 8 U.S.C. 1401(a) (1958). The distinction between international agreements and Indian treaties was first drawn by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832) which held that the Indian tribes were *dependent* sovereigns and were not subject to the laws of the United States or of a state within the boundaries of their treaty-created reservations unless expressly made so by Congress.

The federal government has, since 1871, been foreclosed by act of Congress from making new treaties with Indian tribes. 16 Stat. 544, 566; 25 U.S.C. 71. The notion of complete internal sovereignty of Indian tribes has undergone erosion due to the continuing impact of the dominant Western-European civilization.

Under certain circumstances, state governments have been permitted to assume jurisdiction over Indian reservations for certain purposes. Public Law 280, 67 Stat. 588 (1953); 18 U.S.C. 1162; 28 U.S.C. 1360 (1958).

Indian reservations are something of an anomaly in our system of government. It would appear that they are "federal municipalities". *Wheeler-Howard Act*, 48 Stat. 984 (1934); 25 U.S.C. 461, et seq. The *Wheeler-Howard Act* authorizes the issuance of a constitution to Indians residing on a reservation for purposes of self-government. This same statute also authorizes the formation of business corporations by Indians on a reservation to engage

in commercial enterprises. Thus, on any Indian reservation you can find three types of legal entities asserting rights of "self-government". There may exist (1) a municipal government with a constitution and by-laws, (2) a business corporation with a charter and by-laws, or (3) a continued legal entity succeeding to the legal rights of the aboriginal tribe. 65 Dec. of Dept. Int. 483. This court summarized the legal history of the relationship between the Indians and the states in *Village of Kake v. Egan*, 369 U.S. 60, 71-75 (1962). Added to the limitations upon reservation self-government outlined above is the fact that, under certain circumstances, the federal courts have jurisdiction to review tribal court decisions relating to matters of internal self-government. *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

Granting the "police power" of the *Wheeler-Howard Act* organizations and the "tribe" over the reservation (subject only to the power of Congress to legislate in this area and the possibility of review in federal courts), off-reservation fishing and hunting is a matter extra-territorial. It must, therefore, be grounded in the survival of some *right* guaranteed to the aboriginal tribe or band of Indians whose rights have been succeeded to a presently existing tribe or band of Indians *other* than the municipal corporations or business corporations referred to above.

With this background in mind, the logical starting point in an analysis of the legal significance of Indian treaties is the relationship between the In-

dians and the federal government *prior to the execution of those treaties.*

At the outset, it must be granted that the Indians did not have the ability to understand the common-law concepts of private property. An Indian's "rights" were communal in nature with all other members of the tribe or band with which he was associated. *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893) articulates this concept:

"The distinctive characteristics of communal property is that every member of the community is an owner of it as such. He doesn't take as heir, or purchaser, or grantee; if he dies, right of property doesn't descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners."

When the United States began to preempt the Indians' aboriginal "use and occupancy" of the North American continent by permitting non-Indian settlement of the land, the question quite naturally arose as to the relative rights of the United States, or its grantees, and the Indians to the soil then aboriginally occupied by the tribes and bands.

Johnson v. McIntosh, 21 U.S. 543, 584, 5 L. Ed. 681 (1823) is the leading opinion of this Court discussing this question.

" . . . Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in

others, the exclusive right of the discovery to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

"By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'property and territorial rights of the United States,' whose boundaries were fixed in the second article. *By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain passed definitively to these states.* We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." (Emphasis supplied.)

The emphasized language takes on added meaning in light of Chief Justice Marshall's discussion of the patents by the Crown of Great Britain to the American colonies at page 579 of the opinion:

"These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. *A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters.*" (Emphasis supplied.)

By this statement, it is clear that it was this Court's position that the United States succeeded to all of the sovereign or governmental rights of Great Britain over the lands described in the treaty of peace ending the Revolutionary War. Even more significant is the statement that the words conveying only political powers "would never contain words expressly granting the land, the soil and the waters". Therefore, the grantor (Great Britain) must have conveyed to the grantee (the United States) both the governmental and proprietary rights to the lands ceded by the treaty of peace ending the Revolutionary War. It was expressly held that the United States has the power to make grants of soil occupied by Indians to private individuals and, by patent, to convey clear title in fee simple absolute. This is inconsistent with the notion that the Indian possessed "title" to the lands which they aboriginally occupied which might give them the power to "sell their lands". This concept is clarified in *Johnson v. McIntosh, supra*, at pages 587-88:

"The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. *They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as to the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were*

colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." (Emphasis supplied.)

The conclusion to be reached is that the United States possesses the power to grant to its citizens or any resident all right, title and interest to lands aboriginally occupied by Indian tribes. It is submitted that the Indians had no legal right to be compensated for their aboriginal use and occupancy. They could merely hope that political or moral considerations would lead the United States to grant them title to land. *The aboriginal use and occupancy of the Indian tribes amounts to nothing more than a common-law tenancy at sufferance, where their occupancy is not a technical trespass and, therefore, not adverse to the paramount title vested in the United States.*

Has the doctrine of *Johnson v. McIntosh, supra*, been rejected, modified or affirmed by subsequent judicial construction? *Tee-Hit-Ton Indians v. United*

States 348 U.S. 272 (1955) expressly adopted Marshall's rationale with the following language:

" . . . (a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

(page 279)

"This leaves unimpaired the rule derived from *Johnson v. McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment."

(pages 284-85)

"No case in this Court has ever held that taking of Indian title or use ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek

to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willing made to allow tribes to recover for wrongs as a matter of grace, not because of legal liability. 60 Stat. 1050." (pages 281-82)

"The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." (pages 288-89)

In footnote 21 to its opinion, the Court added: "The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on H.R. 1921, 83rd Cong., 2d Sess. . . ."²

From the foregoing, it is clear that a treaty between the United States and Indian tribes could not operate as a recognition or reservation of "aboriginal title".³ Yet, it was precisely this notion that the Court relied upon, with no citation of authority to support its position, in *United States v. Winans*, 198 U.S. 371 (1905) to describe the nature of off-

²The rationale of the *Tee-Hit-Ton* case, *supra*, has been followed by the lower federal courts. *Cowlitz Tribe of Indians v. City of Tacoma*, 253 F.2d 625 (9th Cir., 1957); *Prairie Band of Potawatomi Indians v. United States*, 165 F. Supp. 139 (Ct. Cl. 1958) and *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963).

³At least one commentator disagrees with the rationale of *Tee-Hit-Ton v. United States*, *supra*, and argues the "menagerie theory" of the legal relationship of the Indian tribes to the land. Cohen, *The Legal Conscience*, pp. 273, et seq.

reservation fishing rights at "usual and accustomed" grounds under the Treaty with the Yakama, 12 Stat. 951 (1855).

At page 381, the Court stated:

" . . . In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Based on the assumption that the treaty operated as a reservation of "aboriginal title" the court went on to characterize the off-reservation fishing "right" as an easement at page 384:

" . . . Nor does it (the treaty) restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The language of the Court in the *Winans* case, *supra*, is obviously inconsistent with the fundamental theory of Indian title. *Johnson v. McIntosh*, *supra*; *Tee-Hit-Ton Indians v. United States*, *supra*.

Unfortunately, characterizing the "usual and accustomed" ground provision of the treaties as a common-law easement by the judiciary subsequent to the *Winans* decision, *supra*, has occurred without regard to the fact that its rationale of "original Indian title" has been completely rejected. *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) illustrates the expectable results if the *Winans* doctrine is carried to its logical and ultimate conclusion. In this case, the Umatilla Indians sought a declaratory judgment of their off-reservation fishing rights on the Colum-

bia River and its tributaries and an injunction against the application of state conservation laws and regulations by the Oregon State Game Commission. The Circuit Court of Appeals upheld the issuance of the injunction holding that the state had failed to meet the burden of proving that the application of its conservation laws was "indispensable" to the preservation of the fishery resource. To support this conclusion the court relied on *United States v. Winans, supra*, *Tulee v. Washington*, 315 U.S. 681 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). It was the opinion of the court that the Indians "reserved" their aboriginal rights to the fishery resource when they "granted" the lands they aboriginally used and occupied to the United States by execution of a treaty. The only qualification to this theory is that the "citizens of the Territory" might share in the enjoyment of the resource with the Indians. By placing the Indians in the position of "grantor", the non-Indians must thereby be relegated to the position of mere licensees. The court supported this theory by its interpretation of the dicta in the *Tulee* case, *supra*,

"that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." (315 U.S. at 684)

The court stated at page 172 of the *Umatilla* opinion, *supra*:

"Thus, in both the *Tulee* and *Makah* cases it was held that the Indian's right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."

In order to meet this burden of proof, the state must show that there are no alternative means of preserving the fishery resource. This means that the state would have to show a total closure of both sport and commercial non-Indian fisheries *and* a continuing decline in the fishery population to such an extent that the very preservation of the resource itself was at stake before it could apply its conservation regulations to a treaty Indian fishing at his "usual and accustomed" fishing grounds. The Indians would be in the advantageous position of having a prior vested right to the entire anadromous fishery resources of the Pacific Northwest because the "usual and accustomed" language is found in all of the Indian treaties executed in the states of

"Webster's Third International Dictionary, unabridged, 3rd Ed., 1963, defines "indispensable" as follows:

"1. that cannot be set aside or neglected or disregarded; 2. that cannot be dispensed with: that is absolutely necessary or requisite or essential: that cannot be done without."

Washington, Oregon, and Idaho.⁵ State regulations could only be justified on the basis of protection of Indian fishing.

Tulee v. Washington, supra, does not support the position taken by the court in the *Umatilla* decision for two reasons. First, *Tulee* uncritically accepts the rationale of the *Winans* decision contrary to the theory of aboriginal title as held by this Court in *Johnson v. McIntosh, supra*, and reaffirmed by this Court in *Tee-Hit-Ton Indians v. United States, supra*. Second, *Tulee* held that it was not proper for the state to charge an Indian a fee for a fishing license where the revenues so derived were to be used for the general support of state government rather than being related to a conservation program. The language relied upon by petitioners (necessary for conservation) is merely dicta and certainly unnecessary to the holding of the case.

The adoption of the *Winans* philosophy of original Indian title and the imposition of the burden of proving "indispensability" upon the state by the

⁵This "usual and accustomed" language, without significant variation, is found in the following treaties: Treaty with the Nisqually et al, Nov., 1854, 10 Stat. 1132; Treaty with D'wamish, Suquamish and other Indians, Jan. 22, 1855, 12 Stat. 927; Treaty with S'Klallam Indians, Jan. 26, 1855, 12 Stat. 1933; Treaty with Makah Indians, Jan. 31, 1855, 12 Stat. 939; Treaty with Walla Walla, Cayuses, and Umatilla Indians, June 9, 1855, 12 Stat. 945; Treaty with Yakima Indians, June 9, 1855, 12 Stat. 951; Treaty with Nez Perce Indians, June 11, 1855, 12 Stat. 957; Treaty with Tribes of Indians of Middle Oregon, June 24, 1855, 12 Stat. 963; Treaty with Quinaielt and Quillehute Indians, July 1, 1855, 12 Stat. 971; Treaty with Flathead, Kootnay and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975.

Ninth Circuit Court of Appeals is directly inconsistent with this Court's decision in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563-64 (1916):

" . . . We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised."

" . . . We also assume that these Indians are wards of the United States, under the care of an Indian agent, but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the locus in quo. *Ward v. Race Horse*, *supra*; *United States v. Winans*, *supra*."

Ward v. Race Horse, 163 U.S. 504 (1896) likewise upholds the proposition that a state possesses the sovereign or governmental authority to Indian hunting and fishing outside the boundaries of an Indian reservation. Significantly this case was cited with approval by this Court in *Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962):

"Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v.*

Race Horse, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

"True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter."

The *Kake* case, *supra*, establishes that the state (1) may apply its conservation laws to Indians who are beneficiaries of a treaty insofar as their off-reservation fishing activities are concerned, and, (2) may apply its conservation laws to Indians who claim special privileges based on aboriginal use and occupancy or "original Indian title".

The burden of proving "indispensability" as articulated by the Ninth Circuit Court of Appeals in the *Umatilla* case, *supra*, amounts to a presumption that state conservation laws are unconstitutional in their application to the appellants who fish commercially with efficient, modern gear at their "usual ac-

customed" grounds with such a devastating effect upon the fishery resource as shown by this record. This notion is not only inconsistent with the cases discussed herein, but also with the fundamental presumption that all state laws are valid so long as they are not constitutionally objectionable. A serious breakdown in law-enforcement has been experienced and may be expected to continue so long as the nature of "original Indian title" is misunderstood. The anadromous fishery resource would be placed in jeopardy.

II. *Assuming Arguendo, That Treaty Indians Possess Special Rights to Fish Outside Their Reservation Boundaries, The "Reasonable and Necessary" Test Affords Recognition of Indian Rights and Yet Allows Conservation of The Anadromous Fishery Resource.*

Without abandoning what respondents believe to be the proper interpretation of the treaty, we submit that the only workable standard to be applied is that used by the court below if Indians are held to have a qualified immunity from state conservation laws.

The Washington Supreme Court quoted with approval from *Tulee v. Washington*, 315 U.S. 681 (1942):

" . . . The appellant (Tulee), on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places,' free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state

with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

Further, the court quoted with approval from *Organized Village of Kake v. Egan*, 369 U.S. 69 (1960). *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963).

In the instant case and in *Department of Game v. Puyallup Tribe, Inc.* October Term, 1967, Docket No. 247, the Washington Supreme Court followed the *McCoy* standard.

This concept permits unified management of the resource and yet grants to the Indians a "special right" not accorded to other citizens.⁶

The holding of the Idaho Supreme Court in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953), Cert. denied, 347 U.S. 937 (1954) that a state has no power to regulate off-reservation hunting (and fishing) is demonstrably unsound, as this court has never overruled *Ward v. Race Horse*, 163 U.S. 504 (1896) and *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916).⁷

⁶It is interesting to note that two judges of the *McCoy* court would limit the Indian "right" to the use of aboriginal fishing equipment. *State v. McCoy*, 63 Wn. 2d 421 at 439 (1963).

⁷This was recognized by a commentator in Hobbs, "Indian Hunting and Fishing Rights" 32 George Washington L. Rev. 504 (1964).

Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963) enunciates an unsound rule from the standpoint of conservation of the anadromous fishery resource⁸.

III. *No Act of Congress or other Statute deprives State Courts of Jurisdiction over Indian Treaty Rights.*

Petitioners assert that control over an Indian enjoying a treaty right to fish outside a reservation has been preempted by the Federal Government and, therefore, the state has no jurisdiction over this matter. They rely on an analogy to the doctrine of preemption as applied in labor law and the doctrine of supersession as applied in *Pennsylvania v. Nelson*, 350 U.S. 497 (1955).

Petitioners mis-construe the nature of the theories and, therefore, misapply them. Neither theory has application here.

Pennsylvania v. Nelson, *supra*, held that the Smith Act superseded the enforceability of the Pennsylvania Sedition Act. The three tests of supersession are:

"First, '(t)he scheme of federal regulation (is) so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" (350 U.S. at 502)

"Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject.'" (350 U.S. at 504)

⁸See argument, *infra*, pp. 26 to 28.

"Third, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program." (350 U.S. at 505)

The companion doctrine of preemption in labor law was explained in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) at page 245:

" . . . When an activity is originally subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Supersession merely means that Congressional action in a field overrules any state activity in that area and makes state remedies or sanctions inoperative. Preemption ousts all state jurisdiction, or as *Garmon, supra*, points out, jurisdiction of all bodies save the N.L.R.B. is ousted in the field.

Petitioners argue that state control has been done away with by Congressional action. However, they fail to point to any Congressional act that meets the tests set forth in *Pennsylvania v. Nelson, supra*. Congress has never evidenced any intention that a national policy is to govern fishing by treaty Indians off their reservations. We are faced here with a total absence of Congressional action regarding off-reservation tribal fishing rights.

Petitioners rely on Public Law 280 (67 Stat. 588) and argue that Section 2 (6) (18 U.S.C. 1162 (6)) prohibits the state from regulation of fishing by treaty tribes. We would point out that Public

Law 280 is concerned with Indian country-reservations and trust lands. The instant case is concerned with a controversy over *off-reservation* fishing by certain individuals who may not be entitled to some special legal privilege (the precise quantum of which is yet to be determined).

18 U.S.C. 1162(b) provides:

"shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Instead of granting a treaty tribe any special rights, the statute says only that there shall be no impairment of any such rights (if such exist as a matter of law).

Since petitioners assert that the Federal Government has pre-empted the field, it is incumbent upon them to show that the tests laid down in *Pennsylvania v. Nelson and Garmon, supra*, have been met. This they cannot do, for there is no such legislation.

Nor does the subject matter of this action lend itself to Federal control. It has long been established law that the states have a special interest in the conservation of the fish and wildlife resources for equal enjoyment by all citizens. *Geer v. Connecticut*, 161 U.S. 519 (1896).

CONCLUSION

Respondents request that this Court interpret the language of the treaty "in common with the citizens of the Territory" to mean that Indians are entitled, outside the boundaries of a reservation, to the same rights, privileges, and obligations as are all other citizens; and that the injunction issued by the court below be affirmed.

Respectfully Submitted,

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SUPREME COURT U. S.

Office-Supreme Court, U.S.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
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STATE OF WASHINGTON

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STATEMENT

The Department of Game and the Department of Fisheries of the State of Washington (respondents herein) are duly constituted agencies of state government charged with the duty of conserving, preserving, propagating and maintaining food fish and

game fish for the benefit of the public. (Revised Code of Washington, Title 75 and Title 77). The food fish and game fish resources of the state are of great importance in terms of economic and recreational benefits to the public.

In recent years, various of the thirty-nine tribes and bands of Indians in the State of Washington who are signatories to and beneficiaries of treaties with the United States¹ have asserted privileges and immunities from the application of state fishery conservation laws and regulations. Petitioners herein are one such group of Indians who claim privileges and immunities under the Treaty of Medicine Creek, 10 Stat. 1132. Under such claimed treaty-secured privileges and immunities, petitioners and large numbers of other Indians have begun to engage in large scale net fisheries outside reservation boundaries on rivers and streams throughout the State of Washington for commercial purposes. The effect of such unregulated off-reservation Indian fisheries has been to seriously deplete salmon and steelhead runs in some of our watersheds. If permitted to continue, irreparable damage will be done to the salmon and steelhead resources of the State of Washington.

¹Treaty of Medicine Creek, 10 Stat. 1132; Treaty With The Yakima, 12 Stat. 951; Treaty of Point Elliot, 12 Stat. 927; Treaty With The Quinaealt, 12 Stat. 971; Treaty With The Walla Walla, 12 Stat. 945; Treaty With The Makah, 12 Stat. 939; Treaty With The Nez Perce, 12 Stat. 957.

ARGUMENT

Serious confusion has arisen between the state agencies charged with the duty of conserving salmon and steelhead and large numbers of treaty Indians who claim immunity from the application of state fishery conservation laws. Courts of various jurisdictions have construed the treaty language, as it pertains to off-reservation fishing and hunting activities by Indians, in a contradictory manner. The treaty language in question is “* * * the right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory * * *” (10 Stat. 1132).

The Supreme Court of Idaho has ruled the State of Idaho has no jurisdiction to enforce its hunting laws and regulations to treaty Indians outside reservation boundaries, *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1954).

The Ninth Circuit Court of Appeals has ruled that the State of Oregon may only apply its conservation laws and regulations to Indians outside reservation boundaries where it is “indispensable” to the preservation of the resource itself. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

In the opinion below, the Supreme Court of the State of Washington interpreted the same treaty language in such a manner as to permit the state agencies to enforce state conservation laws and reg-

ulations to treaty Indians outside reservation boundaries whenever it is "reasonable and necessary" to do so. *Department of Game v. The Puyallup Tribe, Inc.*, 70 W.D. 2d 241, 422 P.2d 754 (1967) and *Department of Game v. Nugent Kautz*, 70 W.D.2d 270, 422 P.2d 771 (1967).²

In light of the varying interpretations placed upon the language which is found in all Indian treaties executed in the Pacific Northwest, respondents recommend that this Court grant the Petition for a Writ of Certiorari.

Respondents would also point out that the differing interpretations of the treaty language by the lower courts, discussed above, are directly inconsistent with prior decisions of this Court. See: *Ward v. Race Horse*, 163 U.S. 504 (1896); *United States v. Winans*, 198 U.S. 371 (1905); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942) and *Village of Kake v. Egan*, 369 U.S. 60 (1962).

²*Department of Game v. Nugent Kautz, et al.*, *supra*, is presently before this Court on a Petition for a Writ of Certiorari, October Term, 1967, Docket No. 319.

CONCLUSION

For the foregoing reasons, respondents respectfully urge that the petition for a writ of certiorari in this case be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 247 AND 319.—OCTOBER TERM, 1967.

The Puyallup Tribe, etc., Petitioner,
247

v.

Department of Game of
Washington et al.

Nugent Kautz et al., Petitioners,
319

v.

Department of Game of
Washington et al.

On Writs of Cer-
tiorari to the
Supreme Court
of Washington.

[May 27, 1968.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present a question of public importance which involves in the first place a construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854 (10 Stat. 1132) and secondly the constitutionality of certain conservation measures adopted by the State of Washington allegedly impinging on those treaty rights.

These suits were brought by respondents in the state court against the Indians for declaratory relief and for an injunction. The trial court held for respondents and with exceptions not relevant to our problem the Supreme Court affirmed in part and remanded for further findings on the conservation aspect of the problem. *The Department of Game et al. v. The Puyallup Tribe*, 70 W. D. 2d 241, 422 P. 2d 754; *The Department of Game et al. v. Kautz et al.*, 70 W. D. 2d 270, 422 P. 2d 771. We granted the petitions for certiorari and consolidated the cases for oral argument. 389 U. S. 1013.

While the Treaty of Medicine Creek created a reservation for these Indians, no question as to the extent of

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those reservation rights, if any, is involved here.¹ Our question concerns the fishing rights protected by Article III, which so far as relevant reads as follows:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands. . . ."

¹ It should be noted that while a reservation was created by Article II of the Treaty, Article VI provided that the President might remove the Indians from the reservation "on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands." Article VI also gave the President authority alternatively to divide the reservation into lots and assign them to those individuals or families who were willing to make these places their permanent home. In 1887 Congress passed the General Allotment Act (24 Stat. 388) authorizing the division of the reservation land among the individual Indians. In 1893 Congress passed the Puyallup Allotment Act, 27 Stat. 633, which established a commission to make the allotments. And by the Act of April 28, 1904, 33 Stat. 565, Congress gave "the consent of the United States" to the removal of prior restrictions on alienation by these Indians. The trial court in No. 247 found that all lands within the boundaries of the reservation created by the Treaty have been transferred to private ownership pursuant to these Acts of Congress, with the exception of two small tracts used as a cemetery for members of the tribe; and much of it is now in the City of Tacoma. See *State v. Satiacum*, 50 W. D. 2d 513, 314 P. 2d 400 (1957). Whether in light of this history the reservation has been extinguished is a question we do not reach. Cf. *Seymour v. Superintendent*, 368 U. S. 351, 356-359. The Washington Supreme Court seems to hold that the right to fish on streams once within the old reservation is protected by the Article III guarantee. See 70 W. D. 2d, at 256, 257. There are indeed no other fishing rights specifically reserved in the Treaty of Medicine Creek except those covered by Article III.

The fish to which the Treaty rights pertain in these cases are salmon and steelhead, anadromous fish that hatch in the fresh water of the Puyallup River and the Nisqually River. The steelhead is a trout; the salmon are of four species—chinooks, silvers, chums, and pinks. They come in from the ocean, pass through the salt water of Puget Sound, enter the fresh waters at the mouth of rivers, and go up these rivers to spawn. The adult salmon die after spawning, but not necessarily the steelhead. In time the young fry return to the ocean and start the cycle anew.

People fish for these species far off shore.² As respects fishing within her territorial waters, Washington specifies the time when fishing may take place, the areas open to fishing, and the gear that may be used.³

Fishing licenses are prescribed.⁴ Steelhead may be taken only by hook⁵ and not commercially. Salmon may be taken commercially with nets of a certain type in certain areas.⁶ Set nets or fixed appliances are barred

² Fishing for salmon in the high seas is governed by a convention agreed to by Canada, Japan, and the United States on May 9, 1952. 4 U. S. T., Pt. I, p. 380. As to sockeye salmon and pink salmon, the United States and Canada have a separate convention first signed May 26, 1930, and amended as of July 3, 1957. 8 U. S. T., Pt. I, p. 1057.

Washington bars the use of nets in fishing for salmon in the international waters of the Pacific. Wash. Rev. Code § 75.12.220.

³ Wash. Admin. Code §§ 220-16-010 to 220-48-060 (salmon); Wash. Dept. of Game, Perm. Regs. Nos. 32-35 (1964), Temp. Reg. No. 273 (1968) (steelhead).

⁴ Wash. Rev. Code §§ 75.28.010-75.28.380; §§ 77.32.005-77.32.280.

⁵ Wash. Dept. of Game, Perm. Reg. No. 34 (1964).

⁶ Wash. Rev. Code § 75.12.140 defines the permissible areas for reef net fishing. Section 75.12.010, while containing a prohibition against commercial fishing in a large salt water area, allows the director to permit commercial fishing there within stated times and with prescribed gear. And see Wash. Admin. Code §§ 220-32-010 to 220-32-030 (Columbia River area); §§ 220-36-010 to 220-36-020

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in "any waters" of the State for the taking of salmon or steelhead.⁷ So is "monofilament gill net webbing."⁸

Nearly every river in the State has a salmon preserve at its mouth;⁹ and Commencement Bay at the mouth of the Puyallup River is one of those preserves.¹⁰

The Puyallup Indians use set nets to fish in Commencement Bay and at the mouth of the Puyallup River and in areas upstream. The Nisqually Indians use set nets in the fresh waters of the Nisqually River. These Indians fish not only for their own needs but commercially as well, supplying the markets with a large volume of salmon. The nets used are concededly illegal if the laws and regulations of the State of Washington are valid; and it is to that question that we now turn.¹¹

(Grays Harbor area); §§ 220-40-010 to 220-40-020 (Willapa Harbor area); §§ 220-48-010 to 220-48-060 (Puget Sound area). Commercial fishing in other areas is banned. Wash. Rev. Code § 75.12.160; Wash. Admin. Code § 220-20-010.

⁷ Wash. Rev. Code §§ 75.12.060, 77.16.060.

⁸ Wash. Rev. Code § 75.12.280. It appears that the monofilament type of gear (made of plastic) is less visible in clear water in daylight than the nylon web.

⁹ Wash. Admin. Code § 220-48-020.

¹⁰ Wash. Admin. Code § 220-48-020 (10).

¹¹ Petitioners in No. 247 argue that the Washington courts lacked jurisdiction to entertain an action against the tribe without the consent of the tribe or the United States Government (citing *United States v. United States Fidelity Guaranty Co.*, 309 U. S. 506, and *Turner v. United States*, 248 U. S. 364), viewing the suit as one to "extinguish a Tribal communal fishing right guaranteed by federal Treaty." This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts. See e. g., *DeMarrias v. South Dakota*, 319 F. 2d 845 (C. A. 8th Cir. 1963); *Buckman v. State*, 139 Mont. 630, 366 P. 2d 346 (1961). With respect to crimes committed by Indians within reservation boundaries, see 18 U. S. C. §§ 1153, 1162. And see § 401 (a) of Title IV

The "right of taking fish at all usual and accustomed places, in common with" citizens of the Territory under a treaty with the Yakimas was involved in *United States v. Winans*, 198 U. S. 371. The lands bordering the Columbia River at those places were acquired by private owners who under license from the State acquired the right to fish there and sought to exclude the Indians by reason of their ownership. The Court held that the right to fish at these places was a "continuing" one that could not be destroyed by a change in ownership of the land bordering the river. 198 U. S., at 381. To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" (198 U. S., at 380) would be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more." *Ibid.* In *Saufer Bros. Co. v. United States*, 249 U. S. 194, the Court construed the same provision liberally so as to include all "accustomed places" even though the Indians shared those places with other Indians and with white men, rejecting a strict, technical construction not in keeping with the justice of the case.

It is in that spirit that we approach these cases in determining the scope of the treaty rights which the Puyallups and Nisqually obtained.

The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had pre-

of the 1968 Civil Rights Act, Pub. L. No. —, — Stat. —; *Seymour v. Superintendent*, 368 U. S. 351; *United States v. Celestine*, 215 U. S. 278.

served the right to fish at the "usual and accustomed places" in the "usual and accustomed" manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed places" may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, superseded by § 201 (b) of the Nationality Act of 1940, 8 U. S. C. § 1401 (a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In *Tulee v. Washington*, 315 U. S. 681, we had before us for construction a like treaty with the Yakima Indians which guaranteed the right to fish "at all usual and accustomed places, in common with the citizens" of Washington Territory. 12 Stat. 951. Tulee, a member of the tribe, was fishing without a license off the Yakima Indian Reservation; the State convicted him for failure to obtain a license. We reversed, saying:

"... while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." *Id.*, at 684.

In other words, the "right" to fish outside the reservation was a treaty "right" that could not be qualified or conditioned by the State. But "the time and manner of fishing . . . necessary for the conservation of fish," not being defined or established by the treaty, were within the reach of state power.

The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved. *United States v. Winans, supra*, was one forerunner of the *Tulee* case:

" . . . surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the State unreasonably, if at all, in the regulation of the right." 198 U. S., at 384.

Another forerunner of *Tulee* was *Kennedy v. Becker*, 241 U. S. 556, which also involved a nonexclusive grant of fishing rights to Indians. Indians were charged with the spearing of fish contrary to New York law, their defense being the fishing rights granted by a treaty. The Court, in sustaining the judgments of conviction, said:

"We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised." 241 U. S., at 563-564.

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The use of purse seines and other nets¹² in the salt waters is permitted for commercial purposes under terms and conditions prescribed by the State; and their use in these areas is open to all, Indians as well as others. The use of set nets¹³ in fresh water streams or at their mouths is barred not only to Indians but to all others. An expert for the State testified that the reason for that prohibition was conservation:

"The salmon are milling and delaying, and especially in times of low water or early arrival of the run or for any number of reasons, the delay may be considerable.

"Once again the fish are available to the net again and again. This is the main reason for the preserve, so that the milling stock will not be completely taken.

"Then further, this is a point in the bay at the river mouth where you very definitely have a funnelling effect. The entire run is funneled into a smaller area and it is very vulnerable."

¹² A purse seine is a type of gear that encircles a school of fish, lead weights taking the net down, and a boat operating at each end of the net. A line runs through rings on the bottom of the net, making it possible to close the bottom of the net. Wash. Admin. Code § 220-16-010 (15).

A gill net has a mesh which fish cannot back out of once their heads get through. Gill net fishing is drift fishing, the net being up to 1,800 feet in length. Wash. Admin. Code, § 220-16-010 (8).

Purse seines and drift gill nets are used in salt water.

¹³ Set gill nets are often anchored at one end, stretched on a cork line, and held down by weights, while drifting at the other end. They are often located one above another at a short distance. Fish are taken by hand out of the nets as a boat travels its length. The mesh in the gill net varies, depending on the size of the species of salmon that are running—chinook, 8 to 8½ inches; silver, chum, and sockeye, 5½ inches. Set gill nets run from 40 to 150 feet depending on the width of the river at the point they are used. Wash. Admin. Code § 220-16-010 (19).

Fishing by hook and line is allowed in these areas because when salmon are "milling near the river mouth," they are not "feeding and they don't strike very well, so the hook and line fishery will take but a small percentage of the available stock no matter how hard they fish."

Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 W. D. 2d, at 257) conservation measure¹⁴ was left for deter-

¹⁴ Much emphasis is placed on *Maison v. Confederated Tribes*, 314 F. 2d 169 (C. A. 9th Cir. 1963), where another treaty right pertaining to other Indians was tendered in opposition to Oregon's power to regulate salmon fishing in the interests of conservation. This Treaty gave the Indians the right to fish off the reservation at all "usual and accustomed stations in common with citizens of the United States." *Id.*, at 170. The Court of Appeals held that Oregon could regulate the Indians' Treaty right to fish under two conditions: "first, that there is a need to limit the taking of fish, second, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation." *Id.*, at 172.

The idea that the conservation measure be "indispensable" is derived from *Tulee v. Washington*, *supra*, where in striking down the license fee we said that "the imposition of license fees is not indispensable to the effectiveness of a state conservation program." 315 U. S., at 685. But that statement in its context meant no more than that it would, indeed, be unusual for a State to have the power to tax the exercise of a "federal right." As stated by the Court in the sentence immediately following, the license fee "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Ibid.* Cf. *Murdock v. Pennsylvania*, 319 U. S. 105, 112: "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

As to a "regulation" concerning the time and manner of fishing outside the reservation (as opposed to a "tax"), we said that the power of the State was to be measured by whether it was "necessary for the conservation of fish." 315 U. S., at 684.

The measure of the legal propriety of those kinds of conservation measures is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State. See *Ferguson*

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mination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad, remanded the case for further findings.¹⁵ When the case was argued here, much was said about the *pros* and the *cons* of that issue. Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

Affirmed.

v. *Skrupe*, 372 U. S. 726; *Williamson v. Lee Optical Co.*, 348 U. S. 483; *Daniel v. Family Ins. Co.*, 336 U. S. 220; *Olson v. Nebraska*, 313 U. S. 236.

¹⁵ In No. 319, the parties entered into a stipulation of facts which, because of its scope, made unnecessary "the tailoring of the injunction to meet a specific situation, as in the *Puyallup* case" 70 W. D. 2d, at 274, 422 P. 2d, at 774. The Washington Supreme Court did, however, remand to the trial court with instructions to limit the injunction only to those violations of Washington law that had been stipulated to be presently necessary to the conservation of the fish runs. It was stipulated that the "usual and accustomed fishing grounds" (within the meaning of the Treaty) encompassed the Nisqually River and its tributaries downstream from the Nisqually Reservation. The parties further stipulated that the defendants had fished contrary to state fishing conservation laws and regulations since 1960; that "[i]f permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River"; and that "it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River . . . that the plaintiffs' enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds."

